IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

IN THE MATTER OF SAMUEL WINSHIP, APPELLANT

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX TO APPENDIX

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* The entire transcript of the March 30th hearing is included in the Appendix. Page references are for the convenience of the Court to indicate the pages of the transcript where testimony of the witnesses begins, and to designate rulings of particular significance.

APPENDIX

Sec. 731 F.C.A. Form 7-6 (Delinquency-Supervision)

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF BRONX

Docket No. D-797/67

In the Matter of

SAMUEL WINSHIP

A Person Alleged to be a Juvenile Delinquent, *Respondent.*

Petition (Juvenile Delinquent)

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner, Rae Goldman, resides at 2436 Grand Concourse, Bronx, New York.

2. Petitioner is a person authorized to institute a proceeding under Article 7 of the Family Court Act by reason of the fact that (s)he is a person injured by the alleged activity of the respondent.

3. The Respondent above named is a male who was born on August 5th, 1954 and resides at 946 Bronx Park South, Bronx.

4. The following are the names and addresses of the parents or other persons legally responsible for the care of said Respondent or with whom said Respondent is domiciled:

Name	Residence	Relationship
Melvin Winship	946 Bronx Park So.	Father
Ethel (Coleman)	"	Mother

5. (Upon information and belief,) on or about March 28th, 1967 at about 6:15 P.M. at 2436 Grand Concourse, County of Bronx, City and State of New York said Respondent (set forth a concise statement of alleged delinquent acts)

did wilfully and unlawfully enter the locker room of the Normandie Furniture Store at the above location, and did remove from the petitioner's pocketbook $112 in lawful money of the United States, which he did steal and carry away.

6. The foregoing acts of said Respondent, if done by an adult, would constitute the crime or crimes of Larceny.

7. Said Respondent was over seven years and less than sixteen years of age at the time of the foregoing acts.

8. Said Respondent requires supervision, treatment or confinement.

9. As to the allegations herein made upon information and belief, the sources of Petitioner's information and grounds of belief are the statements and admissions of Respondent, if any, and the statements and depositions of witnesses, if any, now on file with this Court.

WHEREFORE, Petitioner prays that the Respondent be adjudged a juvenile delinquent and dealt with in accordance with the provisions of Article 7 of the Family Court Act.

Dated: March 30th, 1967

RAE GOLDMAN
Petitioner

VERIFICATION

STATE OF NEW YORK
COUNTY OF BRONX, SS.:

I, Rae Goldman, being duly sworn, say I am the Petitioner in the foregoing petition; said petition is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

RAE GOLDMAN
Petitioner

Sworn to before me, this
30th day of March, 1967.

CARL MELTZER
Clerk of the Court

LET (SUMMONS) (WARRANT) ISSUE

.....

J.F.C.

This is to certify that this is a true copy of Petition made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
Clerk of Court

(Seal)

Date Dec 8 1967

FAMILY COURT STATE OF NEW YORK CITY OF NEW YORK
JUVENILE TERM: BRONX COUNTY

PART I

In the matter of

SAMUEL WINSHIP, Respondent.

DOCKET NO: D 797/67.

BEFORE: HONORABLE MILLARD MIDONICK, Judge

DATE OF HEARING: March 30, 1967.

PRESENT:

Mrs. Rae Goldman, Petitioner.
Samuel Winshop, Respondent.
Mrs. Ethel Winship, Mother.
Mr. Melvin Coleman, Witness for Respondent.
Patrolman Clarke, Shield No. 4258, 46th Precinct.
Mr. John McShane, Reporting Probation Officer.
Mr. Larry Yorke, Youth House Representative.

APPEARANCE: IRENE ROSENBERG, ESQ., Attorney for Respondent, Legal Aid Society, 1109 Carroll Place, Bronx, New York.

[2] COURT OFFICER: Number 9, Samuel Winship, W-i-n-s-h-i-p. We have the police officer and the petitioner present. We have the boy and mother and petitioner and police officer are present.

THE COURT: Now, are you Mrs. Winship?

MRS. WINSHIP: Yes.

THE COURT: You are the mother of the boy here?

MRS. WINSHIP: Yes.

THE COURT: All right. Now, are you aware of the fact that you can have any lawyer that you can afford and that you can choose a private one or this public one or no lawyer at all, madam?

MRS. WINSHIP: Yes.

THE COURT: Which lawyer do you want?

MRS. WINSHIP: I will take the Legal Aid.

THE COURT: All right. Very good, Mrs. Rosenberg. How do you plead?

MRS. ROSENBERG: Not guilty, Your Honor.

THE COURT: Yes. Where is Mrs. Rae Goldman?

COURT OFFICER: Step up, please.

THE COURT: Well, is Lieutenant Sloan in- [3] terested in this case?

COURT OFFICER: He is not back yet.

THE COURT: Is there a policeman involved in this case?

POLICE OFFICER: No, not as a witness.

THE COURT: You saw nothing and you just arrested the boy on a complaint?

POLICE OFFICER: Not on this complaint.

THE COURT: Well, were you interviewed by Lieutenant Sloan? Does he want to try this case?

POLICE OFFICER: Yes. He's not here.

MR. YORKE: He had to go to a meeting.

THE COURT: I see. I cannot wait. I can't wait then. The petitioner is to be sworn in.

RAE GOLDMAN, the Petitioner herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. Give us your name. A. Rae Goldman.

[4] Q. Now, you live at 2436 Grand Concourse, Bronx? A. Yes. I am employed there.

Q. That is where you are employed? A. Yes.

Q. Where do you live? A. 1595 Union Port Road.

Q. What county is that? A. Bronx.

Q. And you are the lady who accuses this boy? A. Yes.

Q. Is that correct? A. Yes.

Q. Now, what happened, I take it, on March the 28th? That is two days ago. A. Yes, sir.

Q. At what time in the afternoon or evening did this happen? A. 6:15 in the evening.

Q. Where, madam? A. In the store.

Q. At 2436 Grand Concourse, Bronx? A. Yes.

Q. What is your capacity there? [5] A. Sales help.

Q. Yes. A. Sales person.

Q. What happened to you? Would you describe what happened to you? A. Well——

Q. And who did it. A. Well, one of the young ladies that I work with had came back from dinner and that she walked into the locker rooms and adjoining the locker room is a little bathroom. She said, "Who is in there"? I said, "No one". She said, "Yes, there is. The door is locked".

MRS. ROSENBERG: This is all hearsay.

THE COURT: Well, it depends.

MRS. GOLDMAN: We waited a minute to see who would come out of the bathroom.

MRS. ROSENBERG: Was she with the person?

THE COURT: Were you there?

MRS. GOLDMAN: Yes, I was there.

THE COURT: Yes. She was there.

MRS. GOLDMAN: Yes.

THE COURT: She was told the door was locked and that she waited for it to open.

[6] MRS GOLDMAN: Yes, that's right. The door had opened in a minute or two and out ran this boy.

EXAMINATION CONTINUED BY THE COURT:

Q. Samuel Winship, the boy standing here? A. Yes.

Q. What happened? A. Well, I ran to the locker to see if my bag was there and that I had some money in my locker and it was gone. I ran out of the store and they told me that they saw a youngster running around the block which I tried to run after him and capture him.

Q. Yes. A. I saw no one. I came back and the girls had found my bag in the——

Q. Wait a minute. Did you see your bag? A. No, I did not see my bag. It was gone.

Q. The trouble with the way you testified is that the girls had "found my bag" is something that someone else can testify about and not you. They told you so? A. Well, I

assumed that the boy had my bag. I assumed that he had my bag with my money. When I came back——

[7] MRS. ROSENBERG: Oh, Your Honor.

MRS. GOLDMAN: It was empty.

THE COURT: Well, the assumptions don't put little boys in jail. You have to know something.

MRS. GOLDMAN: This boy ran out of the bathroom and my bag was on the bathroom floor.

Q. Did you go in afterwards and find it there yourself? A. Yes.

Q. Your bag was in the bathroom that this boy had run out of? A. Yes, right.

Q. What condition was your bag in? A. Scattered. My cosmetic case was scattered and everything was scattered and my money wasn't there.

Q. How much money had been there when you left? A. Approximately $120.

Q. I see. A. $112. I am sorry.

Q. Do you remember what kind of bills? A. Well, I had a $50 bill, two twenties and the rest, I don't know.

Q. Now, how long after this boy ran out did you see [8] him next? A. Next, I saw him here.

Q. Yes. A. The next time I saw him was last night in the police station.

Q. Now, then, did you identify him among a group or just by himself? A. Just this little boy because I have seen him a number of times sneaking around and prowling around the store.

MRS. ROSENBERG: Objection.

MRS. GOLDMAN: And that very often I have threatened to call the policeman to get him out.

Q. What kind of a store is it? A. A furniture store.

Q. I see. A. He would hide behind the chairs.

MRS. ROSENBERG: Objection.

THE COURT: Well, the objection is overruled. I am hearing this, Mrs. Rosenberg, for the limited purpose and it happens to be the most important purpose in the case as far [9] as I can see up to now of how well this lady had known this boy's face and figure. Otherwise, her identification depends in good part about how well she knew him. She's now describing how well she knew him. The testimony is not going to be used against the boy who skulks about, but whether he has been seen before.

Q. How many times before? A. At least six times. In fact, he once shined my shoes in the store.

Q. I see. A. He always has a little shoe box with him.

Q. Did you know his name? A. No.

Q. No? A. No.

Q. How good or bad was the light when he ran out of that bathroom? A. It was still daylight.

Q. It was still daylight? A. Yes.

Q. Was the daylight shining into that place where you [10] saw him? A. Well——

Q. I don't know whether there were any windows or what. A. Well, I saw him run out of the place and out into the street and it was daylight.

Q. Do you mean you saw him as he went through the door? .A Right.

Q. Which is well lit? A. Yes, well lit.

Q. You gave chase, but did not catch him? A. Yes, that's right.

Q. Is that right? A. Yes.

Q. Your bag you have but not the $112? A. Yes.

Q. Is that right? A. Yes.

Q. Now, was there any other little boy in that bathroom? A. No, just this little boy.

Q. What does the bathroom say on the outside? Does [11] it say women or men or nothing? A. No, nothing. Just the door. We know it's for the employees only and we know it's the bathroom.

Q. Now, was there any other person that you—that wasn't a co-worker, there at the time that this little boy was in that bathroom? A. No.

Q. No customers? A. No. At 6:00 o'clock happens to be a very quiet time. It is dinner hour.

Q. Everyone else in the store were people that were your co-workers? A. Yes.

Q. Two girls? A. They know this boy very well, too.

MRS. ROSENBERG: Objection.

THE COURT: The objection is sustained. You must not tell us what someone else knows.

MRS. GOLDMAN: Yes.

THE COURT: What you know only is what you can swear to. You can't swear to anything else.

MRS. GOLDMAN: All right.

[12] THE COURT: You can swear that there were other people present when this boy was about the store from time to time and that you saw him shine their shoes. They're not here to testify.

MRS. GOLDMAN: I am unfamiliar with this, and I tried to answer as best as I can.

THE COURT: I understand. I am listening. Tell me one more thing if you can remember. What was the period of time, madam, between the time that you last saw your bag intact and you saw this boy rush out of that bathroom?

MRS. GOLDMAN: About 5:30 because I had come back from dinner that time and I put my bag in there.

Q. With the money in it? A. Yes.

Q. How far was the locker that you put your bag in from this bathroom? A. Two steps.

Q. Right alongside then? A. Yes.

Q. Was it locked or not locked? [13] It wasn't locked.

Q. And are there any other lockers for the other employees? A. Yes, there are three other lockers.

Q. You had your own private locker? A. Right.

Q. And does it make a noise when it's opened? A. No, not necessarily.

Q. Is it steel or wood? A. Steel.

Q. Is it in plain sight of where you were performing your chores between 5:30 and 6:00 o'clock? A. Yes.

Q. Was it at 6:00 o'clock that you saw this boy or 6:15? A. Was the locker in plain sight?

Q. Yes, of you. A. No, the lockers are behind a closed door.

Q. Is there any other access to your store except from the front? A. No, just the front.

Q. Did you see when this boy had come in that night? A. No.

[14] Q. Were you aware that he was in the premises before he came out of the bathroom? A. No.

Q. I see. A. Not at that particular time, no.

Q. So, then, for one half hour, approximately, that bag was out of your sight? A. Yes.

Q. It was a little more than a half hour? A. Well, I would say a little more than a half hour.

Q. About 5:30 to 6:15? A. Yes, this had happened at 6:15.

Q. Now, during that whole 45-minute period, do you recall any customers walking into the store and leaving your sight for the back? A. No. When a customer walks into the store we, as a rule, follow the customers because we try to give the customer attention.

Q. However, this boy seemed to have gotten into the store before 5:30 or after and you know not which? A. No.

Q. Is it because of his size that it is hard to follow him in your store with furniture? [15] A. Well, he knows his way around.

Q. He is a little one? A. Yes.

THE COURT: Let's estimate his size, shall we? How tall are you?

MRS. ROSENBERG: Five foot four and with heels, five-five.

THE COURT: I would say that he is a little under five feet, wouldn't you? Do you know your size, son?

RESPONDENT: No, sir.

MRS. ROSENBERG: About four-eleven.

MRS. WINSHIP: I am four-eleven and a half.

THE COURT: Would you stand beside him. What are you with heels, mother?

MRS. WINSHIP: Well, I'm four-eleven right now.

THE COURT: The boy is a full two inches shorter. He's about four feet nine. How old is the boy, Mrs. Rosenberg? Would you concede his age?

MRS. ROSENBERG: He is 12.

[16] THE COURT: All right.

MRS. ROSENBERG: Yes. He'll be 13 this August.

EXAMINATION CONTINUED

BY THE COURT:

Q. Now, have you gotten any money back that you lost? A. No.

Q. No? A. No.

Q. Is there any other witnesses here with you? A. No.

THE COURT: All right. This lady is here to defend the boy by State law and that she will ask you questions, too, and please answer what you can.

MRS. GOLDMAN: Yes.

EXAMINATION BY MRS. ROSENBERG:

Q. I didn't understand whether or not you were in the store during your supper hour or went out. A. No, I was in the store.

Q. You were in the store all the time? A. Yes.

Q. Was the entrance visible to you? [17] A. Yes.

Q. At all times? A. Yes.

Q. Did you say that you did not see this boy? A. I didn't see him come in, no.

Q. How long did you look at the person coming out of the bathroom? How many seconds did you get to look at the face? A. At this little boy?

Q. At the person who was in the bathroom. A. Well, I would say, no more than about ten seconds because, let's say, it's about 20 feet from the doorway that he ran quickly. Let's say about ten seconds.

Q. Did you get a look at his face? A. Yes. I saw the profile.

Q. His profile? A. Yes.

Q. Do you remember what the little boy was wearing? A. Yes. He was wearing this coat with the fur collar and his glasses and he wore a cap.

Q. You said a cap? A. A cap.

Q. Did you say that the locker in which you had put [18] your pocketbook, prior to having supper, was unlocked? A. Yes, it was unlocked.

Q. Yes. A. The door was closed but it was unlocked.

MRS. ROSENBERG: No further questions, Your Honor.

THE COURT: All right. Do you have any other witnesses at all?

MRS. GOLDMAN: No. I didn't think that I had to bring any witnesses.

THE COURT: All right.

MRS. ROSENBERG: I move to dismiss upon the ground for failure to establish a prima facie case.

THE COURT: Do you wish to have a witness of your own?

MRS. ROSENBERG: Yes.

THE COURT: All right. You may step down, please.

(Whereupon, the petitioner in this matter steps down from the witness stand.)

MRS. ROSENBERG: Thank you.

THE COURT: Who is your first witness?

[19] MRS. ROSENBERG: I call Mrs. Winship.

THE COURT: All right.

(Whereupon, the mother, Mrs. Winship, takes the witness stand.)

ETHEL WINSHIP, a witness herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. What is your full name? A. Ethel Winship, W-i-n-s-h-i-p.

Q. And your address? A. 946 Bronx Park South.

Q. I take it that you are the mother of Samuel here? A. Yes, I am.

THE COURT: Go ahead.

MRS. ROSENBERG: Yes.

EXAMINATION BY MRS. ROSENBERG:

Q. Now, Mrs. Winship, on the 28th, 1967, which was this past Tuesday—— A. Yes.

Q. Do you know where your son, Samuel, was? A. Yes, I do.

Q. He didn't go to school that day? A. No, no school.

[20] Q. Because of the Easter vacation? A. Yes.

Q. Would you describe to the Court what you did that day? A. Well, he got up and my son and daughter had breakfast. Then after having breakfast, I decided to take them to the zoo. We went to the zoo about 10:00 o'clock. We got back about an hour or two later. I went upstairs and Samuel had lunch. Then he took his sister bicycle riding. After that, I called him up to have dinner.

Q. About what time was that? A. He went down, let's see, about 3:00 or 4:00 o'clock is what I would say.

Q. When did they come back up to the house? A. Well, a little after 5:00.

Q. A little after 5:00? A. Yes.

Q. Yes. A. They came upstairs. They had dinner at 6:00 o'clock that night.

Q. At 6:00 o'clock? A. Yes.

Q. Did Samuel leave the house at any time after he [21] came up? A. No.

Q. From bicycle riding? A. No. Samuel stayed up that evening and watched television with his father.

Q. Who else was in the house besides you and your husband? A. My husband, my brother, my brother-in-law and myself and my daughter.

Q. Now, is there a back door to your apartment? A. No, it's not.

Q. Is there a fire escape? A. Yes, there is.

Q. Is it possible that Samuel could have slipped out through the fire escape? A. No, because I have a gate on my fire escape which is locked at all times and that is my bedroom.

Q. Your bedroom? A. Yes.

Q. Well, it's a gate that is locked and you have a key? A. Yes, I do.

Q. Now, is there any way that Samuel could have left [22] the house or slipped out of the door without you or someone else in the house seeing him? A. It's impossible.

Q. Impossible? A. Yes.

Q. What is your address? A. 946 Bronx Park South.

Q. Do you know, approximately, what distance your apartment is from 2436 Grand Concourse? A. No, I don't actually. I know it's quite a distance from home. From what I gather, it's on Fordham Road on the Concourse and in order for me to leave and that I would have to take a bus to get over to that side. In fact, I think I have to take the 20 bus, that is 2-0 bus that goes over there.

MRS. ROSENBERG: No further questions.

THE COURT: All right.

MRS. ROSENBERG: I have no further questions.

THE COURT: Well, do you wish for me to ask this mother any questions, Mrs. Goldman?

MRS. GOLDMAN: No, I don't.

THE COURT: All right. Thank you.

MRS. ROSENBERG: I have another witness.

THE COURT: Oh, yes. I would like to ask her something. [23] THE COURT: Oh, yes. I would like to ask her something.

EXAMINATION BY THE COURT:

Q. Has your son shown any signs of having any money in the last two days? A. No, no more than what I gave him myself.

Q. Which was what? A. Well, on the date that we went out to the zoo, I gave him $1.00 and I gave my daughter 50 cents to spend at the zoo and buy odds and ends, and they bought a little junk that they sell in the zoo.

Q. He should have only change with him? A. Yes.

Q. Have you checked to see what he has? A. Yes, definitely so. I make sure every time.

. I am talking about yesterday and today. A. Yester-
?
. Yes. A. Samuel only had about 20 cents is what I
e him.
. No money at all? Are you sure? A. Yes.
. He has no place in the house to hide it, that you know
[24] A. No.
HE COURT: Do you have any money with you son? Do.
want him to be searched?
RS. WINSHIP: He may be searched.
RS. ROSENBERG: Do you have any money with you?
At this time, the attorney is conversing with the re-
ident.)
. WINSHIP: He may be searched.
HE COURT: Well——
OURT OFFICERS He was upstairs and they automatically
ch him.
HE COURTS Was he in Youth House overnight?
OURT OFFICERS He was in detention, Judge. T[illegible]o-
cally searched him upstairs.
HE COURT: Were you searched upstairs, son?
ESPONDENT: Yes.
HE COURT: Is there any of your possessions upstairs at

RESPONDENT: My hat.
HE COURT: What kind of a hat? This boy has a right to
ain silent.
RS. ROSENBERG: I'll allow him to answer for this pur-
.
HE COURT: What kind of a hat?
ESPONDENT: A leather hat.
HE COURT: All right. That is what the lady has said he
wearing. All right, mother. Does this boy of yours ever
e shoes to make a little money?
RS. WINSHIP: Yes, I let him do it.
HE COURT: Well, he evidently had done it away from
house at this store because the testimony shows that,
know——
RS. WINSHIP: Well, I understood what she said.
HE COURT: Yes. He knows his way there.
RS. WINSHIP: Yes.

THE COURT: The question is, how long it takes him to get there. Do you know how long it takes you to get to her store?

MRS. WINSHIP: I don't know where her [25] store is.

THE COURT: It is 2436 Grand Concourse.

MRS. ROSENBERG: Is that near Fordham Road?

MRS. GOLDMAN: Yes. 188th Street on the Concourse.

MRS. ROSENBERG: Near what street is 946 Bronx Park South?

MRS. WINSHIP: I'm on Vice Avenue. On the corner of Vice Avenue and Bronx Park South. The nearest big street is 180th Street and, which is two blocks behind me.

MRS. ROSENBERG: That is about a half hour trip?

MRS. WINSHIP: In order to get over to where she——

THE COURT: Well, I don't understand how this lady had found your son unless she knew enough about him to describe him very carefully and where he lived, too. Do you know how your son was found?

MRS. WINSHIP: Well, the only thing that I can say is what I got from him last night [27] and that is all I know.

THE COURT: Do you know how they found your son?

MRS. WINSHIP: No. Actually speaking——

THE COURT: We'll find ou from Mrs. Goldman.

MRS. WINSHIP: Well, I don't know how she winds up that way.

THE COURT: Any other questions?

MRS. ROSENBERG: No. I have another witness.

THE COURT: Very good. Bring the next witness in.

MELVIN COLEMAN, a witness herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. What is your name, please? A. Melvin Coleman.

Q. What is your address, sir, and where do you live? A. Well, 946 Bronx Park South.

THE COURT: All right. Go ahead.

How old are you, son?

[28] THE WITNESS: I am 26.

THE COURT: You are 26?

THE WITNESSS Yes.

THE COURT: All right.

EXAMINATION BY MRS. ROSENBERG:

Q. Mr. Coleman, were you in the house at 946 Bronx Park South, in your sister's apartment on March the 28th, 1967? A. Yes.

Q. In the afternoon? A. Yes.

Q. Did you leave the house at all that day? A. No.

Q. You stayed in the house all day? A. Yes.

Q. Do you remember, approximately, what time you had dinner? A. Well, I think about 6:00.

Q. About 6:00? A. Yes.

Q. Was Samuel eating dinner with you? A. Yes.

Q. Do you know whether Samuel was in the house before [29] 6:00 o'clock? A. Yes.

Q. Do you know what time he came in? A. Well, no. I can't remember.

Q. Was it in the afternoon? A. Yes, it was in the afternoon.

THE COURT: You are this boy's uncle?

THE WITNESS: Yes.

THE COURT: What day of the week was this that you are talking about?

THE WITNESS: I don't remember what date it was.

THE COURT: You don't remember what date it was? What good is all this testimony.

MRS. ROSENBERG: March the 28th.

THE COURT: Well, you are telling him a number. I asked him what day of the week it is. If he didn't know what day of the week it is, you might as well not have him on the witness stand.

EXAMINATION CONTINUED

BY MRS. ROSENBERG:

Q. Do you know what day of the week that was? [30] A. I think it was a Wednesday.

THE COURT: Well, it wasn't, my dear sir. It was Tuesday and you don't know what date we're talking about and I don't think that your testimony is worth anything. It's as if he didn't testify at all.

MRS. ROSENBERG: Well, if I can ask him what date they went to the zoo, that might help to recall the date.

THE COURT: Well, I'm very worried about this man not

being able to identify the date that we're talking about because every other day of human existence has nothing to do with this case. You go ahead and try to identify it, but it seems to me that something is very strange.

EXAMINATION CONTINUED

BY MRS. ROSENBERG:

Q. Do you remember what day Samuel went to the zoo with his mother? A. Well, Tuesday.

Q. Tuesday? Was Samuel in the house— on Tuesday, March the 28th, do you remember what time Samuel had come [31] in after he had gone bicycle riding? A. I think it was about 3:30.

Q. Did Samuel have dinner with you? A. Yes.

Q. How long did the dinner last? A. Well, I don't know how long it lasts? I never time it.

Q. Did Samuel eat dinner in, every day this week? A. Yes.

THE COURT: Do you live in that house?

THE WITNESS: Yes, I stay there sometimes.

Q. Did you eat dinner at 946 Bronx Park South, in your sister's house, every day this week? A. Yes, every day this week.

Q. Every day this week? A. Yes.

Q. And every day, was Samuel eating dinner with you? A. Yes.

Q. And do you know, approximately, what time the dinner is served in your sister's house? A. Usually about 6:00.

Q. About 6:00? [32] A. Yes.

Q. Samuel ate dinner with you every single night this week? A. Yes.

remember the particular date. That is all the questions that

MRS. ROSENBERG: I think it is irrelevant that he may not I have of this witness.

THE COURT: Well, Mrs. Goldman, do you have any questions that you can think of to ask this gentleman?

MRS. GOLDMAN: No.

EXAMINATION BY THE COURTS

Q. Can you tell me, sir, whether your nephew, Samuel, has shown any signs of having money in the last two days? A. Well, except when he had money when he goes shining.

Q. Do you mean just a few cents? A. Yes.
Q. Not large bills like $50 bills or $20 bills? A. No.
Q. Does he usually ask you for money? A. Sometimes.
Q. Has he asked you for money in the last week? [33] A. Yes.
Q. Would you say which days he asked you for money? A. Sunday I gave him money to buy a kite. On Tuesday, Wednesday.
Q. Did he ask you yesterday for money? A. Yes.
Q. Did you give him any? A. I give him some change.
Q. He asked you yesterday? Are you sure now? A. Yes, I'm positive.

THE COURT: Well, all right. Any other questions?

MRS. GOLDMAN: No, sir.

THE COURT: All right. Thank you, Mr. Coleman.

MRS. ROSENBERG: Well, I want him to take the stand.

THE COURT: Come up here, son.

SAMUEL WINSHIP, the respondent herein, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

[34] Q. What is your name, son? A. Samuel Winship.
Q. Now, you are 12 years old? A. Yes.

THE COURT: Go ahead.

MRS. ROSENBERG: Thank you.

EXAMINATION BY MRS. ROSENBERG:

Q. Now, Samuel, do you remember when March the 28th was? Was it on Tuesday? That is this Tuesday. Today is Thursday. A. Yes.
Q. Do you remember where you were on Tuesday? A. Yes.
Q. Did you go to school that day? A. No, sir. There was no school.
Q. What did you do that day? A. Me and my mother and sister went to the zoo.
Q. You have to speak up. A. From there, I went home and then——

THE COURT: Well, you are not speaking loudly enough for Mrs. Goldman to hear you. After the zoo, what?

RESPONDENT: Well, after the zoo, I asked [35] my mother if I can take my sister down again so that we can go bicycle riding.

THE COURT: Take her bicycle riding?
RESPONDENT: Yes.
THE COURT: What did your mother say?
RESPONDENT: Yes.
THE COURT: Did you?
RESPONDENT: Yes.
THE COURT: All right. Go ahead.
RESPONDENT: Well, I stood around the block. My mother called me up to come upstairs to get ready to eat.
Q. When? A. Well, what time?
Q. Was it light or dark outside? A. It was daytime.
Q. It was? A. Yes.
Q. How long was it before you ate dinner, once you came up into the house? A. Well, dinner was already served.
Q. Did you go out of the house at any time on Tuesday night after supper? [36] A. No.
Q. What did you do all evening? A. I sat down and looked at TV.
Q. Television? A. Yes.
Q. What time did you go to sleep? A. Well, I went to bed about quarter to 8:00.
Q. Quarter to 8:00? A. Yes.
MRS. ROSENBERG: All right. That is all the questions.
THE COURT: All right. Well, Mrs. Goldman, if you can think of anything to ask him you do and, while you are thinking, I'll ask him a few.

EXAMINATION BY THE COURT:

Q. Do you shine shoes in Mrs. Goldman's store from time to time? A. No. I have never shined her shoes before.
Q. Never shined her shoes at all? A. No.
Q. She said that she remembers you doing it. Do you think that she's wrong? [37] A. Yes, sir.
MRS. GOLDMAN: Have you ever been into the store?
RESPONDENT: No.
MRS. GOLDMAN: You don't know the store?
RESPONDENT: No.

EXAMINATION CONTINUED

BY THE COURT:

Q. You don't know the store at all? A. No.
Q. How do you suppose Mrs. Goldman knows that you wear a black leather hat and all of the that?

MRS. GOLDMAN: And the glasses.

Q. And the glasses, if you have never been there before?

MRS. GOLDMAN: A fur collar.

RESPONDENT: I have never been inside of the store.

Q. You don't know that bathroom that she is talking about? A. No.

Q. You don't know the locker that she is talking about? [38] A. No, I don't.

Q. Have you ever seen Mrs. Goldman before yesterday in the police station in your whole life? A. Well, that was my first time.

Q. The first time that you saw the lady? A. Yes.

Q. Do you know how she came to find you? A. No, sir.

Q. You do not. Do you have any money with you right now? A. No, sir.

Q. Can you turn your pockets inside out, please, so that we can all see? A. Yes.

(Whereupon, the respondent is turning his pockets inside out.)

THE COURT: You have only a comb and brush there. Also your coat. Is there anything in your coat? Will you have a look, Mr. Court Officer.

COURT OFFICER: Yes.

(Whereupon, the Court Officer is patting the coat.)

MR. YORKE: Youth House takes all property.

THE COURT: Does he have any property in Youth House?

MR. YORKE: I don't know.

MRS. ROSENBERG: Can you find out?

MR. YORKE: I don't know.

THE COURT: Would you do that.

MR. YORKE: I can find that out.

THE COURT: All right.

MR. YORKE: If he has that, it would be upstairs.

THE COURT: All right. We'll have a stipulation on your say-so, won't we? Now, then, I don't have anything more that I can ask this boy that I can think of at the moment, Mrs. Goldman. Do you wish for me to ask him anything else?

MRS. GOLDMAN: No, sir.

MRS. ROSENBERG: Can we recall Mrs. Goldman to the stand?

THE COURT: Yes, of course. Is this your last witness?

MRS. ROSENBERG: Yes.

[40] THE COURT: All right. Now, Mrs. Goldman, would you please come back here.

MRS. GOLDMAN: Yes.

(Whereupon, the petitioner was recalled to the witness stand.)

EXAMINATION BY THE COURT:

Q. The first thing that I want to know and I don't know if Mrs. Rosenberg would like to know. I want to know how you came to find him and trace him altogether. A. Well, when I found that my money was missing, I called the police station.

Q. Yes. A. I described the boy to the policeman. That is Patrolman Clarke, was one of the patrolmen there. Last night, I received a call at about 9:00 o'clock telling me that they had picked up a little boy and he answered to my description and would I come.

Q. Did you have any place to direct them to, as to name, address? A. Just his description.

Q. Or school? A. No.

Q. Just description? [41] A. Yes, and the fact that I had seen him several times.

Q. How did you describe him to the police? A. I described him as a little boy between 12 and 14 years of age. Under five feet five, round face, dark coloring and wearing glasses and I described his clothes.

Q. I see. A. Because, as I say or as I have said, I have seen him every so many times.

Q. On that basis, the police had found this little one out of eight million people scattered around the city? A. No, they found him behind a safe.

THE COURT: Well, wait a minute.

MRS. ROSENBER: Objection.

MRS. GOLDMAN: You asked me where.

THE COURT: Well, it's not received into evidence. We'll have to call the police as to how they found him.

MRS. GOLDMAN: All right.

THE COURT: All right. Are you through with this lady?

MRS. ROSENBERG: Is it possible that you could have made a mistake?

[42] MRS. GOLDMAN: No.

MRS. ROSENBER: No?

MRS. GOLDMAN: No. I know the scar on his face. I know that little boy. I couldn't miss him any place.

MRS. ROSENBERG: That is all.

THE COURT: All right. Thank you, ma'am. Police officer, please. You are the one who arrested this boy?

POLICE OFFICER: Yes.

THE COURT: Would you tell us how you found him?

PATROLMAN CLARKE, having been duly sworn by the Court, testified as follows:

EXAMINATION BY THE COURT:

Q. Now, please identify yourself? A. Patrolman Clarke, Shield Number 4258, 46th Precinct, Bronx.

THE COURT: Before I ask this gentleman questions, Mrs. Rosenberg, and since we have no police counsel and that he is not present in the courthouse today, I don't know what '[43] the officer is going to say and I am sure you don't.

MRS. ROSENBERG: No.

THE COURT: I don't know what is coming. We'll have to just play it by ear, won't we?

MRS. ROSENBERG: Yes, sir.

THE COURT: All right.

EXAMINATION CONTINUED

BY THE COURT:

Q. Now, officer, did you get a description from Mrs. Goldman about or asking you to find a boy who had taken her money? A. Well, Your Honor, the description was on our sheet in the precinct. The UF61 Report.

Q. That is in what precinct? A. In the 46th Precinct.

Q. Now, did that cover where this lady works at 2436 Grand Concourse? A. Yes. It includes the place that she works, her residence, her phone number and what happened and in this case it also included a description.

Q. Do you have it with you? A. I don't have it with me.

[44] Q. Do you remember the description from the sheet? A. Well, the description was that the child was under five feet and I remember glasses. I heard the leather cap and the fur collar. Now, this is all that I do recall from the description on the report.

Q. Does your precinct cover the boy's residence at 946 Bronx Park South? A. No, the 48th Precinct covers that.

Q. How far would you say is between 946 Bronx Park South and 2436 Grand Concourse? A. Well, a considerable distance, your Honor.

Q. Yes. A. About 15 minute bus ride or so.

Q. Now, did you, personally, search for this boy as a result of seeing this sheet in your precinct house? A. No. While on patrol on Fordham Road with the Sergeant in our patrol, we— somebody came up to us as we were stopped at a light on Fordham Road and had said that some boy——

MRS. ROSENBERG: Objection.

THE COURT: It has nothing to do with this case except——

THE WITNESS: No, nothing to do with this case. You asked me how did I find him.

[45] The Court: Yes, that is not prejudicial.

MRS. ROSENBERG: If you can ask the policeman——

THE COURT: Well, where did you find him?

MRS. ROSENBERG: Well, whether or not he found the boy because of the description given by the petitioner, Mrs. Goldman.

THE COURT: That is an opinion. We can make up our own minds as to whether the description fits. Where did you find the boy?

THE WITNESS: I found him in the rear of Zaro's Bakery on East Fordham Road.

Q. What do you mean by the "rear"? Was it inside or outside? A. No, inside of the premises in the back door. In the kitchen light.

MRS. ROSENBERG: Your Honor, I would like to stipulate now that he was found pursuant to another complaint that is not before the Court right now. It's going to come out.

THE COURT: He was trespassing some place or other?

MRS. ROSENBERG: Yes.

[46] EXAMINATION CONTINUED

BY THE COURT:

Q. When you saw this boy, did you have the knowledge of the sheet that somebody like him was wanted? A. No, I had no idea.

Q. You didn't look for him but you brought him back to the station house because of some other complaint and when you got there, what happened? A. Well, we called the complainant that we had on the stand before, Mrs. Goldman.

Q. How far away from the complainant's store did you find this boy? A. Well——

Q. Where he was trespassing? A. Do you mean from where Mrs. Goldman works until——

Q. Yes. From the place that you found him. How much of a distance is that there? A. Well, about four blocks.

Q. What was the time of day? A. Well, around 8:40 p.m.

Q. Now, that was last night? A. Yes.

THE COURT: Well, this boy seems to [47] inhabit the district despite all of your talk. He seems to be around there all the time. The next time as well as the night before. He is a person that is in that area. Did he have any shoe shine equipment with him?

THE WITNESS: He had his kit with him, yes.

Q. Did he have any money on him? A. Well, do you mean when I——

THE COURT: You have stipulated that there was some kind of other complaint. I take it it was a lawful arrest and that anything that was taken from him should be considered. It may be for the boy or against him. I don't know.

MRS. ROSENBERG: Well, except it may be prejudicial.

THE COURT: It should be prejudicial if he had money. If he didn't, it will be helpful. I'm going to ask the police officer over your objection.

THE WITNESS: Yes.

Q. Did he have any money or didn't he? A. At the time he did, yes.

Q. How much? A. He had $10 in his pocket, in dimes. Two rolls of [48] dimes.

Q. In dimes? A. Yes.

Q. He had no green money at all? A. No, no folding money. No green money.

Q. Did he have the money loosely in his pocket or in rolls? A. No, rolls.

Q. Do you have that with you? A. Yes.

Q. May I see it? A. Yes.

(Whereupon, the police officer is indicating to evidence that he has before the Court.)

THE WITNESS: There are four rolls here.

(Whereupon, the police officer is indicating again to the rolls of money that he has before the Court.)

THE COURT: Now, just to make life faster, can I ask this lady if any of her money was rolled in this fashion?

MRS. ROSENBERG: I'm going to stipulate that this money had come, Your Honor, from this [49] other petition. I'll stipulate that right now. Otherwise, you're going to think it came from Mrs. Goldman's pocketbook.

THE COURT: I take it this is not your money?

MRS. GOLDMAN: No.

THE COURT: Well, she admits it's not her money. The petitioner's money, it is not.

MRS. ROSENBERG: May I ask him some questions?

EXAMINATION BY MRS. ROSENBERG:

Q. Now, officer, where was this other place where this boy was found last night? A. Zaro's Bakery.

Q. What is the address? A. 384 East Fordham Road.

Q. Where is that? A. That is a half a block north of Webster Avenue at Fordham Road.

Q. Fordham Road, north of Webster? A. Yes.

Q. And Mrs. Goldman's store is on the Concourse and Fordham Road? [50] A. No, it's— it's on the Concourse and 188th Street.

Q. Which is how many blocks from Fordham Road? A. From Fordham Road?

Q. Yes. A. It would be one block north.

Q. This place or this other place, the bakery shop, is about six or seven blocks east of Mrs. Goldman's store? A. No, it's four blocks. That is all. In fact, it's not even four. It's three and a half.

THE COURT: You have been assigned to this area for sometime, haven't you?

THE WITNESS: Yes.

THE COURT: You know the area?

THE WITNESSS Yes.

THE COURT: So, is there anything else that we want to ask this gentleman?

MRS. ROSENBERG: No, sir.

THE COURT: All right. Thank you very much. You better take the money. It's not in evidence.

THE WITNESS: Yes.

MRS. ROSENBERG: The respondent moves to dismiss the petition for failure to establish [51] the allegation by a fair preponderance of the credible evidence.

THE COURT: Well, would you like mother to explain what her boy is doing 15 or 20 minutes by bus, away from home the next night, in the vicinity?

MRS. ROSENBERG: Well, we're concerned with the March 28th——

THE COURT: Well, your defense was that the boy had an alibi. He was not in the area. It seems to me that he was in the area.

MRS. ROSENBERG: The boy lives, Your Honor——

THE COURT: I mean, he lives in an improper sense—he seems to live in the area where the trouble occurred with Mrs. Goldman.

MRS. ROSENBERG: He may have been there one other time. The boy had said that he did not shine shoes in that store. I may add that Webster Avenue is somewhat of a dividing line of the Bronx and more so, it is an east and west type of a thing.

THE COURT: All we're talking about is an alibi that seems to be falling apart. The boy [52] seems to frequent this area.

MRS. ROSENBERG: The mother and uncle testified that on the night that Mrs. Goldman's bag was broken into——

THE COURT: Well, all right. Let's have the uncle back again? That is Mr. Coleman. I hope he hasn't left. He was talking about every night this week.

MRS. ROSENBERG: He testified that every night at 6:00 o'clock they had dinner.

THE COURT: Yes. Now, Mr. Coleman, you are still under oath. Would you give us another few minutes of your testimony, please?

THE WITNESS: Yes.

EXAMINATION BY THE COURT:

Q. Now, as I recall your testimony, sir, you say that this boy was in your sight at dinner time every night this week? A. Yes.

Q. Now, does that includes last night? A. No, not last night.

Q. What do you mean by every night this week, then? [53] A. Well, Monday, Tuesday and Wednesday. I mean, Monday and Tuesday.

Q. Well, Wednesday is last night. A. Right.

Q. You were not eating there last night? A. No.

Q. What kind of testimony were you giving before about every night this week? A. Well, I'm talking about Monday and Tuesday.

Q. How late did you keep eyes on this boy during dinner hour? A. Well——

Q. That is on Tuesday? Until when? A. About 7:00 o'clock.

Q. Last night, sir, you were not there at all? A. No.

Q. You told me that he asked you for money yesterday? What time of the day did he ask you for money? A. In the afternoon before I went out.

THE COURT: Strange.

MRS. ROSENBERG: It may be a perfect case of mistaken identity, Your Honor.

THE COURT: All right. Thank you, Mr. [54] Coleman. I cannot ask you any more.

(Whereupon, the witness was excused.)

MRS. ROSENBERG: This occurrence took place at 6:15 in the evening, Your Honor.

THE COURT: One witness' word against three. It's a question of who is telling the truth.

MRS. ROSENBERG: May I also bring out that during the petitioner's testimony, she said that she had been in the store during the supper hour and that she did not see this boy enter.

THE COURT: Well, it might— he might have been there from 4:00 o'clock on.

MRS. ROSENBERG: Well, if there were any customers in the store, the boy should be obvious. It should have been something that she should have seen and should have caught her attention.

THE COURT: Well, some boy was there. She didn't see any boy. I mean, you're not questioning Mrs. Goldman, saying that some boy was there. Some boy got in there without [55] her knowing about it and that there is no question about it. It comes down to a question of credibility. On the question of credibility, when you have an alibi situation the

boy, of course, is very much interested in getting off. So he is very much interested in testifying that he was some place else even though it may be a lie. The mother loves a boy and may look to tell fibs and an uncle, too. With regard to Mrs. Goldman, what reason does she have to tell any lies. I know of none. Why should she want to punish an innocent boy?

MRS. ROSENBERG: She may rightfully think that she has made a correct identification when, in fact, the identification is not true. If Your Honor will remember before——

THE COURT: Yes.

MRS. ROSENBERG: Before we do anything. We had a case last week here and there was an eye witness identification of a boy.

THE COURT: Yes.

MRS. ROSENBERG: Who swore that this was the boy who was in Warwick Training School.

[56] THE COURT: I remember. I'm very worried about these things.

MRS. ROSENBERG: We have——

THE COURT: Yes, I think this lady, Mrs. Goldman, knows the boy very well. She knows all about his shoe box shining. She knows all about his hat and this boy has stated that he has never been in the place before and never laid eyes on the lady. It is impossible that this woman would know this boy so well, and that boy absolutely lies and says that she does not know him at all. The boy can't be believed.

MRS. ROSENBERG: What about the question of the money not being found? $112 not being found.

THE COURT: It will be found once he produces it.

After both sides rest, the petition is found to be proved by a preponderance of the evidence. The testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well. [57] That is a finding. If I'm wrong, I'm wrong

MRS. ROSENBERG: Well, I would like to make one more motion.

THE COURT: What is that?

MRS. ROSENBERG: That this finding by Your Honor violates the boy's equal protection rights because if he was 16, he would have to be found guilty beyond a reasonable doubt.

Your Honor is making a finding by the preponderance of the evidence.

THE COURT: Well, it convinces me.

MRS. ROSENBERG: It's not beyond a reasonable doubt, Your Honor.

THE COURT: That is true. I'm convinced of the facts alleged. Our statute says a preponderance and a preponderance it is. That is the only difference between children and grownups that I can see. I don't think it's an unfair difference at all.

MRS. ROSENBERG: May I make some kind of statement on this for the record and perhaps for your reconsideration at this time?

THE COURT: Yes.

[58] MRS. ROSENBERG: Although the State may lawfully make distinctions between adults and children, the burden of proof and the quantum of the burden of proof has no relation to which the State is making between treatment of the children and adults. If this child was 16, it would be required to be proved against him beyond a reasonable doubt.

THE COURT: Well, I think it's a reasonable distinction in that the State keeps this record a secret. It does not go onto his record. If he were over 16, he would be subject to increasing penalties as and if his crimes multiply or in cases of children and I may go on for a long time with all the arguments made about the protection of children, but I daresay that if the State of New York wanted to, they can reduce all the quantum of truth to a preponderance and I don't think——

MRS. ROSENBERG: That may well be but it's a distinction.

THE COURT: I don't think that there is unequal effect upon this boy since he's not subject to adult imprisonment, adult records, adult punishments. That there is more rehabilitation here and more secrecy here to protect him.

MRS. ROSENBERG: That may well be, but it has nothing to do with the burden of proof imposed by the State. The distinction is between adults and the children may be valid themselves but this particular distinction of beyond a reasonable doubt and a preponderance of the evidence have nothing to do with the State's distinction of treatment of these children as opposed to adults.

THE COURT: Well, this State can make distinctions and unequal laws depending upon reasonable differences.

MRS. ROSENBERG: Is there a valid distinction?

THE COURT: Yes. In this sense there is. Another factor here for the preponderance rule is that anybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt basis [60] and my finding isn't that certain.

MRS. ROSENBERG: No finding is certain.

THE COURT: No, not certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis as an adult finding because it's not made on the same basis, but then there are hundreds of ordinary Civil Court Judgments for money and sometimes for huge amounts made on the preponderance of the evidence by juries and judges alike and injunctions are made and divorces are given. Adultery is found on the basis of preponderance. This boy's life won't be hurt by my finding. The question is if it's true.

MRS. ROSENBERG: He may be hurt.

THE COURT: Yes.

MRS. ROSENBERG: He's subject to training school for this finding.

THE COURT: Well, it would have to be a lot more than this finding before he ever gets taken away from his mother. Let's have the probation report. I must say or get on that your argument is very, very well put, but it does not prevail [61] today.

PROBATION OFFICER: Would you hear the other case because we have the petition on the boy?

THE COURT: All right. Let me ask you, Mrs. Rosenberg, do you want' another Judge to hear the second petition?

MRS. ROSENBERG: I want an adjournment.

THE COURT: I already know this boy has done something wrong.

MRS. ROSENBERG: I know that.

THE COURT: All right.

MRS. ROSENBERG: Well, I'm sure that Your Honor wouldn't be influenced by it, but——

THE COURT: But you are?

MRS. ROSENBERG: Yes.

THE COURT: All right. Do you want an adjournment?

MRS. ROSENBERG: Yes.

THE COURT: What do we do with the boy until the adjournment?

PROBATION OFFICER: Remand. He's a parolee from the training school.

[62] MRS. ROSENBERG: He's not a parolee. His time is up. It has expired.

PROBATION OFFICER: Well, there was an extension going back.

MRS. ROSENBERG: When was there an extension?

PROBATION OFFICER: Active with Mrs. Schwartz. Paroled. The extension was on 1/12/67 for one year as of 2/28/67.

THE COURT: I see.

MRS. ROSENBERG: Well, I dont' have the record here.

THE COURT: All right.

MRS. ROSENBERG: The boy has been home. How long has he been at home with you?

MRS. WINSHIP: Since December.

THE COURT: When was this other offense supposed to have occurred, last night? The one that I have before me is the night before. He makes one theft a night, mother, as far as I can tell.

MRS. WINSHIP: Samuel was home on Tuesday. I'm telling you the straight truth. I don't [63] have to lie for him. Samuel was at home on Tuesday. He was with me.

THE COURT: What was he doing— I'm not hearing that case now, Mrs. Winship. I'm hearing the case of whether I can send him home. What was he doing with four rolls of dimes in his pocket last night?

MRS. WINSHIP: I don't have any idea. I don't know. I got a call from the patrolman. He came to the house.

THE COURT: On the question of whether he's going to commit another crime and am I supposed to send him home with dimes all over him.

MRS. ROSENBERG: May I speak and as long as you're not going to hear the case. There's going to be a hearing on it. The boy said that he did not enter the premises of the bakery shop with the intent to commit a crime therein. He often went into this store to give shoe shines to the owner. When he went in, he saw the money lying on an open safe. He took the dimes to give to the clerk of the store and to tell the clerk that the money wasn't safe there. He did not run. The woman had gotten excited.

THE COURT: When do you want the case heard?

MRS. ROSENBERG: Sometime when you leave.

THE COURT: What is he doing so far from home?

MRS. WINSHIP: He went out shoe shining yesterday. He asked for permission to go. I feel it's better not to hold him at home and to make the extra change for himself.

THE COURT: How did he get so far from home shoe shining?

MRS. WINSHIP: Well, in my neighborhood it's— there's nothing really around.

THE COURT: You can't shine shoes?

MRS. WINSHIP: No, not in that section.

THE COURT: All right. Well, let's see. What else has this boy got on his record? What did he get sent to the training school for?

PROBATION OFFICER: Fire setting and a second one for burglary.

THE COURT: I see.

PROBATION OFFICER: While he was——

[65] THE COURT: Well, this little one?

PROBATION OFFICER: Yes. When he was ten. He was very young. That was in 1963, I believe. He was about nine or ten.

MRS. ROSENBERG: That was a P.I.N.S. the first one or what was it?

THE COURT: When is the case going to be heard?

MRS. ROSENBERG: Well, sometime in April.

THE COURT: April?

MRS. ROSENBERG: Yes.

THE COURT: Why April?

MRS. ROSENBERG: I have to get a witness.

THE COURT: All right.

PROBATION OFFICER: Next week.

MRS. ROSENBERG: Next week.

COURT OFFICER: You'll be in Part II next week, Your Honor.

THE COURT: All right. I won't be here. Good. April what? When will your witness be available? That is the first date.

MRS. ROSENBERG: I don't know, sir. I have to serve a subpoena, sir.

[66] THE COURT: All right. Make it April the 6th.

MRS. ROSENBERG: The 10th.

THE COURT: No. Make it April the 6th. This boy is a dangerous person.

MRS. ROSENBERG: All right. April the 6th.

THE COURT: All right. I'll say paroled over objection of probation officer.

PROBATION OFFICER: He has also been known to intake three or four times for various things that were adjusted.

THE COURT: Well, I can't keep him for more than three or four days for another hearing.

PROBATION OFFICER: Can she produce her witness in three or four days?

MRS. ROSENBERG: I don't know.

THE COURT: Mother, will you promise me to keep him home at night?

MRS. WINSHIP: Yes.

THE COURT: And no more letting him out at all?

MRS. WINSHIP: Well, he won't be out of my sight for a second.

[67] THE COURT: All right. You are not working?

MRS. WINSHIP: No.

PROBATION OFFICER: Excuse me. You made a finding. You can hold him as long as you want to.

THE COURT: I can on a finding, for ten days.

PROBATION OFFICER: That is plenty of time. I don't think the boy should go home.

THE COURT: Why do you want him at home? He's very difficult and somebody is going to hurt him one of these days.

MRS. WINSHIP: He's not difficult at home. Samuel is not difficult at home. I have no problem with him.

THE COURT: You are not working now?

MRS. WINSHIP: No. He goes to school every day.

THE COURT: How long does it take him to get home after school?

MRS. WINSHIP: About ten or fifteen minutes.

THE COURT: He comes home directly to you, mother?

MRS. WINSHIP: He brings home his sister.

[68] THE COURT: Well, if you tell me on your word of honor that you will keep him, except for school time, I'll let him go until the 6th.

MRS. WINSHIP: I'll give you my word of honor for that.

THE COURT: All right. Paroled to mother on condition to personally supervise and personally observe him and super-

vise him in the home except for school time. That is all. All right. He must be in school. He's not a truant, is he?

MRS. WINSHIP: No, he's not.

THE COURT: All right.

MRS. WINSHIP: You can check his school if you would like. He goes to P.S. 6.

THE COURT: All right. No more shoe shining.

MRS. WINSHIP: Definitely not.

THE COURT: That is all. That is adjourned to April the 6th, 1967. That is all. Peremptorily against both sides. I think you should go to trial on the 6th. You don't have to go to trial on that other one. If you are not ready, this matter is going to be disposed of. I think it should be disposed of before Judge DiCarlo. I won't dispose of it. You can bring it to me if you want to, but it's important to know a few more things and it's marked peremtorily. If they're ready for trial and you're not and is the police officer still here?

POLICE OFFICER: Yes.

THE COURT: Are you the one who arrested him?

POLICE OFFICER: Yes.

THE COURT: You better leave a very important note for Lieutenant Sloan to be sure to be ready to try this case on the 6th.

COURT OFFICER: Here's the other petitioner.

THE COURT: Can you come back on the 6th, madam?

PETITIONER: Yes.

THE COURT: All right. The boy needs a witness and this police officer will be back and that is the last time that we'll bother you.

PETITIONER: Thank you.

THE COURT: Paroled on the respondent's request for a witness. That is all. That is [70] marked peremptorily to 4/6/67. That is all.

(Whereupon, the above matter was hereby adjourned to April 6, 1967, to be heard in Part I, Bronx County Juvenile Term.)

REPORTER'S CERTIFICATE
(omitted in printing)

Secs. 742, 744 F.C.A. Form 7-12 (Delinquency Supervision)

FAMILY COURT OF THE STATE OF NEW YORK

CITY OF NEW YORK

COUNTY OF BRONX

Docket No. D-797/67

In the Matter of

SAMUEL WINSHIP

A Person Alleged to be a Juvenile Delinquent, *Respondent*

Determination Upon Fact Finding Hearing
(Juvenile Delinquent)

The petition of Rae Goldman under Article 7 of the Family Court Act, sworn to on March 30th, 1967, having been filed in this Court, alleging that the above-named Respondent is a juvenile delinquent; and

The said Respondent [and Ethel (Coleman) Winship the (parent of said Respondent) having (appeared) before this Court to answer said petition and the allegations of the petition having been (denied) and respondent being represented by a Law Guardian; and

The matter having duly come on for an adjudicatory hearing before this Court;

Now, after hearing the proofs and testimony offered in relation to the case, the Court determines that the following fact have been established by a preponderance of the evidence:

1. That the Respondent on or about March 28th, 1967 at 2436 Grand Concourse, Bronx did an act which, if done by an adult would constitute the crime of Larceny, in that the Respondent at said time and place did act as alleged in the petition; and

2. That the Respondent was a person under sixteen years of age at the time of the aforesaid act.

3. Paroled to Mother to 4/6/67.

4. ———

Dated: March 30th, 1967

MILLARD L. MIDONICK.
J.F.C.

This is to certify that this is a true copy of Fact Finding Hearing made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
(Seal) *Clerk of Court*

Date Dec 8 1967

Docket Entries

Dates	Orders and Adjournments
Mar 30 1967	P — R — Mother — LG
Finding	After both sides rest, this petition is found to be proved by a preponderance of the evidence. The testimony & description of P was very accurate, and the demeanor of P impressed the Court, & his previous knowledge of the R did as well. I am convinced of the facts alleged. Paroled over objections of P. O. to mother on condition she personally observe him & supervise him in the home except for school time, when he must be in school. No more school skipping permitted. 4/6/67 Peremptorily against both sides for trial of D798-67. If it cannot be tried, disposition ought to be concluded if feasible hereunder. MKy
Apr 6 1967	Adj. to April 13, 1967 JD
Apr 13 1967	Placement at State Traning School—discharged to File No. 798/1969

This is to certify that this is a true copy of Endorsements made in the matter designated in such copy and shown by the records of the Family Court of the State of New York, within the City of New York, for the County of Bronx.

RACHEL [Illegible]
(Seal) *Clerk of Court*

Date Dec 8 1967

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 6th day of June, 1968

Present—Hon. Bernard Botein, Presiding Justice
" Samuel W. Eager,
" Louis J. Capozzoli,
" Owen McGivern,
" Benjamin J. Rabin,
Justices

In the Matter of

SAMUEL W.,

A Person Alleged to be a Juvenile Delinquent, *Appellant.*

Affirmance of Order

13051

An appeal having been taken to this Court by the appellant an order of the Family Court Bronx County, entered on April 13, 1967 adjudging him a juvenile delinquent, and said appeal having been argued by Rena K. Uviller, of counsel for the appellant, and by Mr. Raymond S. Hack, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed.

ENTER:

HYMAN W. GAMSO
Clerk.

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 6th day of March in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk*

Remittitur March 6, 1969.

1. No. 616. 68

In the Matter of

SAMUEL W., *Appellant,*
THE FAMILY COURT OF THE STATE OF NEW YORK, *Respondent.*

BE IT REMEMBERED, That on the 6th day of December in the year of our Lord one thousand nine hundred and sixty-eight, Samuel W., the appellant—in this cause, came here unto the Court of Appeals, by Anthony F. Marra and Rena K. Uviller, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The Family Court of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Rena K. Uviller, of counsel for the appellant—, and by Mr. Raymond S. Hack, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Family Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Family Court of the State of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Family Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 6, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein,

RAYMOND J. CANNON
(Seal) *Clerk.*

In the Matter of SAMUEL W., Appellant; FAMILY COURT OF THE STATE OF NEW YORK, Respondent.

Argued December 9, 1968; decided March 6, 1969.

Infants—juvenile delinquency—sufficiency of proof—section 744 (subd. [b]) of Family Court Act, which provides that determination, after hearing, that child did act "must be based on a preponderance of the evidence", is not unconstitutional—not necessary that proof be beyond reasonable doubt—no deprivation of due process—no substantial equal protection question.

1. Section 744 (subd. [b]) of the Family Court Act, which provides that any determination at the conclusion of an

adjudicatory hearing that the child did an act "must be based on a preponderance of the evidence", is not unconstitutional. In the procedure governing juvenile delinquency it is not necessary that the proof be beyond a reasonable doubt.

2. The finding by the Family Court, by a fair preponderance of the evidence, that the allegation against the 12-year-old child to the effect that he had removed $112 from a persons' pocketbook and stolen it was true was a constitutionally sufficient finding. There is no deprivation of due process in the statutory provision.

3. Since the proceeding is different from a criminal prosecution, there is no substantial equal protection question in the case. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of crime.

Matter of Samuel W., 30 A D 2d 781, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 6, 1968, which unanimously affirmed an order of the Family Court (JOSEPH C. DI CARLO, J.), entered in Bronx County, adjudging appellant to be a juvenile delinquent.

Rena K. Uviller and *Charles Schinitsky* for appellant. Section 744 of the Family Court Act which permits a finding of delinquency upon a preponderance of the evidence rather than proof beyond a reasonable doubt is unconstitutional. (*Matter of Gault*, 387 U. S. 1; *Matter of Gregory W.*, 19 N Y 2d 55; *United States* v. *Costanzo*, 395 F. 2d 441; *Leland* v. *Oregon*, 343 U. S. 790; *Woodby* v. *Immigration Serv.*, 385 U. S. 276; *Tehan* v. *Shott*, 382 U. S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719; *Stovall* v. *Denno*, 388 U.S. 293; *People* v. *Ballott*, 20 N Y 2d 600; *Holland* v. *United States*, 348 U. S. 121.)

J. Lee Rankin, Corporation Counsel (*Raymond S. Hack* and *Stanley Buchsbaum* of counsel), for respondent. Due process of law and the equal protection of the law do not require that the acts alleged in a juvenile delinquency petition be proved beyond a reasonable doubt. Subdivision (b) of section 744 of the Family Court Act, which requires that the finding of facts be based upon a preponderance of the evi-

dence, is constitutional. (*People* v. *Lewis*, 260 N. Y. 171; *Matter of Gault*, 387 U. S. 1; *Matter of Gregory W.*, 19 N Y 2d 55; *United States* v. *Costanzo*, 395 F. 2d 441; *Kent* v. *United States*, 383 U. S. 541; *Thompson* v. *Louisville*, 362 U. S. 199; *Jacobellis* v. *Ohio*, 378 U. S. 184; *Haynes* v. *Washington*, 373 U. S. 503; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Woodby* v. *Immigration Serv.*, 385 U. S. 276.)

BERGAN, *J.* A main objective of the special system of law for treating young juvenile offenders is to hold them as children apart from the usual methods and ineradicable consequences of the criminal law. This court in *People* v. *Lewis* (260 N. Y. 171) expressed, in 1932, the hope and the purpose of the framers of the early New York juvenile delinquency statutes, beginning with the Children's Court Act in 1922, that the proceedings were not designed to be punitive but were for the protection and training of a child found in difficulty; and would be administered by humane and parentally minded Judges whose end was not to punish, but to save the child.

The successful juvenile court is concerned primarily with the totality of factors which cause a child to meet difficulty in his life, and only incidentally with the event which brings the child to the court, which may itself play only a small role in that problem.

The Judge, acting as a mature and well-balanced parent, tries to find the answer to the childs' trouble; and only if all else fails and there is no other recourse, does he commit the child to any institution, and even then he tries to find the one best suited to the child's needs and having the fewest punitive policies.

Nothing could be farther removed in temper and purpose than this from the criminal court for adults. And although it has failed, as all human institutions have a tendency to do, always to reach its highest purpose; and has sometimes in method and result seemed to act like a criminal court, it is not reasonably arguable that in the half-century or so of its existence in the United States the juvenile court has profoundly changed for the better the way children in difficulty are treated by the public legal system.

In such a court, the accoutrements of due process evolved from the 18th Century experience with the rigors of commonlaw prosecutions—public trial, shields against self in-

crimination, adversary inquiry into the single event which brought the child to court—seem irrelevant.

As Judge CROUCH wrote for the majority in *Lewis* (p. 177): "For the purposes of this case, the fundamental point is that the proceeding was not a criminal one. The State was not seeking to punish a malefactor. It was seeking to salvage a boy who was in danger of becoming one. In words which have been often quoted, 'the problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' (23 Harvard Law Review, 104, 119, 'The Juvenile Court,' by Julian W. Mack.)*** Since the proceeding was not a criminal one, there was neither right to nor necessity for the procedural safeguards prescribed by constitution and statute in criminal cases."

In that case an important constitutional question was squarely met. The Trial Judge examined the 15-year-old boy as to the facts of alleged delinquency in a private hearing, but in the presence of his family and clergyman, without warning against self incrimination (pp. 173–174). The boy admitted the facts and on his admission the adjudication of juvenile delinquency was made. It was not, Judge CROUCH noted, in examining the constitutional problem, a "criminal trial and there was no defect" (p. 174).

Apart from how the Constitution may be read in its effect on highly informal proceedings looking into the circumstances in which a child is failing in normal growth and in adaptation, there is a genuine and responsibly held difference of opinion about what is best to do. Many sociologists believe that the criteria of the criminal law and its methodology, including protection against self incrimination and the right to counsel in the case of the young child, impair rather than help a process designed not as punishment but as salvation.

A lawyer's tradtional professional duty in an adversary proceeding is to do what he can and fight as hard as he can, to see his client wins. In the criminal case this is to see his client acquitted, the charge reduced, or the punishment minimized. But a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court.

And since the lawyer as advocate ought not be stultified in his professional obligation to sustain his cause, he should likewise not be cast in the role of impartial adviser to the court on the social problem involved; and, thus, the original view of the founders of the juvenile court that it would be better not to have formal adversary proceedings remains essentially valid.

Self incrimination in the historic Star Chamber sense in which the Bill of Rights was concerned is thought by proponents of the juvenile court to have no relevancy to a process in which the particular act which brought the child to the inquiry may play no significant part in an attempt to see him in his total environment and to help him. In theory, at least, there is nothing to incriminate and there is no criminal.

There is, naturally enough, another side of the coin. A different view is shared by a number of lawyers concerned. They see some danger of erosion of constitutional rights in the informality and lack of "legality" in the way juvenile court Judges in practice deal with the children's cases. And they are concerned, also, that "fairness" by the customary standards of the adult criminal case is being withheld from children in juvenile courts.

It is pointed out that the event that brings the child before the Judge is, by definition, the equivalent of a crime, i.e., an "act which, if done by an adult, would constitute a crime" (Family Ct. Act, § 712, subd. [a]). It is noted, additionally, that the disposition of the case, although not penal in nature, may sometimes be not much different from that of youthful offenders convicted under the criminal laws. Under very limited circumstances, for example, the juvenile may be committed to Elmira Reception Center or other similar institutions (Family Ct. Act, § 758, subd. [b]).

Careful and fully explicit safeguards, however, are provided in the statute to insure that an adjudication of this kind is not a "conviction" (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings (§§ 783–784). These protections have had full judicial implementation (*Matter of Giroffi*, 283 App. Div. 890; *Murphy* v. *City of New York*, 273 App. Div. 492; *Matter of Hambel* [*Levine*], 243 App. Div. 530; *Hill* v. *Erie R. R. Co.*, 225 App. Div. 19).

Although this plenary protection to good name and status is very different from the residual disabilities flowing from criminal conviction, the argument in favor of criminal court protective rights for delinquent children continues to stress the possible loss of freedom as one consequence of the proceeding.

The juvenile court system, on the basis of that argument, has had the singular misfortune of being impaled on the sharp points of a few hard constitutional cases (e.g., *Matter of Gault,* 387 U. S. 1; *Kent* v. *United States,* 383 U. S. 541; *Matter of Gregory W.,* 19 N Y 2d 55). This possibility and, in the particular instances, the actuality, were the bases of reasoning by which the court in cases such as *Gault* and *Gregory W.* applied criminal law protective techniques to the juvenile proceedings.

They were not only hard cases; each had facts easily dramatized. They were not typical of the vast mass of juvenile proceedings in the United States. In *Gault* there was an absence of elemental fairness. The complainant was not sworn and did not appear in court; there was no adequate notice of the proceedings given to the parents; there was no counsel or offer of counsel; no record was made of proceedings; there was no right of appeal or review; and the juvenile court Judge, explaining his action, seemed to have a somewhat vague notion of the alternatives open to him (387 U. S. 1, 28–29). The court, accordingly, was able to reach the encompassing conclusion (p. 29): "The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case."

The facts in *Matter of Gregory W.* (*supra*) were almost equally dramatic. One 12-year-old child, mentally disturbed, was detained by police and questioned for 24 hours; the other 12-year-old child for 10 hours. This period was regarded as unreasonable and their admissions held to have been coerced. And *Kent* v. *United States* (383 U. S. 541, *supra*), the precursor of *Gault,* was also a hard case. There, the Juvenile Court of the District of Columbia waived jurisdiction of that court and transferred petitioner to the District Court for criminal proceedings against him with a resulting heavy penal sentence without giving him an adversary right to oppose the waiver. This decision was held arbitrary.

It can scarcely be doubted that *Gault* and *Kent* have had an adverse effect on the concept of a juvenile court free from

the technicalities of the criminal law. (See, e.g., the comment of the Supreme Court of Illinois on *Gault* that the "opinion exhibits a spirit that transcends the specific issues there involved" [*In re Urbasek*, 38 Ill. 2d 535, 541].)

Historically, as it has been seen, a majority of this court gave ungrudging support to the concept of a system of dealing with children's cases free from criminal law technicalities in *People* v. *Lewis* (260 N. Y. 171, *supra*). It is interesting to note that the present constitutional issue was joined in that case almost 40 years ago in the strong dissent of Judge CRANE, with whom Judge KELLOGG concurred, in which substantially all of the objections that have since developed were examined, especially the protection against self incrimination. (See 260 N.Y., pp. 179-185.)

But, of course, the decisions of the majority in *Lewis* could no longer survive the constitutional views which now are dominant; and, indeed, the Legislature has given extensive statutory implementation to procedures which in many respects run the juvenile procedure in close parallel to the adult criminal courts. (See, e.g., Family Ct. Act, art. 7: Part 2, Custody and Detention, §§ 721, 724, 726, 729; Part 3, Preliminary Procedure, §§ 731, 736, 738; Part 4, Hearings, §§ 741, 744, 745, 746, 748; Part 5, Orders, §§ 752, 758; Part 6, New Hearing and Reconsideration of Orders, § 761.)

Whether these techniques really help the child, whose interest it is the declared purpose of the State to protect, remains a debated question, unresolved between the advocates of two quite different methods and two different philosophies. It seems probable we cannot have the best of two worlds. If the emphasis is on constitutional rights something of the essential freedom of method and choiec which the sound juvenile court Judge ought to have is lost; if range be given to that freedom, rights which the law gives to criminal offenders will not be respected. But the danger is that we may lose the child and his potential for good while giving him his constitutional rights.

Some such discussion as that which has been undertaken seems useful to put the present case in perspective. It involves the constitutionality of section 744 (subd. [b]) of the Family Court Act, which is one of the provisions governing the procedure in juvenile delinquency. The section provides that any determination at the conclusion of an adjudicatory hearing that the child did an act "must be based on a pre-

ponderance of the evidence." In a criminal case the standard of proof is beyond a reasonable doubt; that is, if there be a "reasonable doubt" he is "entitled to an acquittal" (Code Crim. Pro., § 389).

The Family Court in the present case made a specific finding by a fair preponderance of the evidence that the fact alleged against the 12-year-old appellant, to the effect he had removed $112 from petitioner's pocketbook and stolen it, was true. The law guardian contemporaneously raised the question of the constitutional sufficiency of the finding. The sufficiency of the finding is the only question on this appeal.

It is not easy to define for the purposes of practical application the tenuous difference between "beyond a reasonable doubt" as a quantitative or qualitative test of proof, and "by a fair preponderanec of the evidence." It is enough to say that for a very long time one has been used in the criminal law and the other in civil law, and that the profession accepts the view that beyond a reasonable doubt is a "higher" standard.

But the standard is in the present case expressly stated by statute; and, indeed, by a statute which goes very far in providing due process safeguards for children in delinquency proceedings in Family Court. The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory provision; and, since the proceeding is quite different from a criminal prosecution, it seems reasonable to think there is no substantial equal protection question in the case.

The decision in *Gault,* in which there was almost a total absence of due process, is not necessarily to be read as an interdiction of this standard of proof required by the New York statute. It is not an absence of procedural due process that a noncriminal status determination have a different measure of proof than that required for conviction of crime. This was the holding of the District of Columbia of Appeals after a reading of *Gault in Matter of Wylie* (231 A. 2d 81). A contrary conclusion was reached in Illinois in *In re Urbasek* (38 Ill. 2d 535, *supra*). The question was not decisive in *United States* v. *Costanzo* (395 F. 2d 441), where the judgment of adjudication was affirmed, and the Trial Judge had applied what the court regarded as a proper standard of proof.

The order should be affirmed, with costs.

Chief Judge FULD (dissenting). There is much in the court's opinion with which I agree but on the narrow question presented—the standard of proof to be applied in proceedings against juvenile delinquents—it seems to me that the answer has been virtually foreclosed by the Supreme Court. In my view, the decision in *Matter of Gault* (387 U. S. 1) requires the conclusion that due process of law is violated if a child may be found to have committed a crime and incarcerated for an appreciable length of time on evidence less than proof beyond a reasonable doubt.

I do not believe that a lesser standard may be justified on the theory that the proceedings—which may result in confinement of a 12-year-old boy in a State Training School for as long as six years—are designed, in the words of the court (opn., p. 197), "not to punish, but to save the child." This rationale, it seems to me, was decisively rejected by the court's approach to the problem in *Gault*. "Ultimately," the court there wrote (387 U. S., at p. 27), "we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . .' [*Holmes' Appeal*, 379 Pa. 599, 616, MUSMANNO, J., dissenting.] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."

Once the Supreme Court decided that the child was entitled, as a matter of due process, to notice of charges, to counsel, to the rights of confrontation and examination and the privilege against self incrimination—because the proceeding is "comparable in seriousness to a felony prosecution" (387 U. S., at p. 36) and because the "safeguards available to adults" in "a normal criminal case *** [may not be] discarded in [a child's] case" (p. 29)—it necessarily follows

that a finding of guilt, which entitles a court to confine a boy until his eighteenth year, may not be predicated upon less than proof beyond a reasonable doubt.

There may not be any decision expressly stating that the reasonable doubt standard is an essential aspect of due process in criminal prosecutions. But who could question that it is? That standard has been so deeply imbedded in our law, is so fundamental and universal, that no one would venture in an ordinary criminal case to apply a standard less stringent. It is essential to due process not only because of the deprivation of liberty which could result but also because of the vital part it plays in the entire criminal procedural scheme. For example, the burden of proof is closely related to the privilege against self incrimination—as a device to offset the adverse effect of a defendants' failure to defend himself. It also compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants. Manifestly, a person accused of a crime, whether he be an adult defendant in a criminal case, or a child charged as a delinquent, would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

My conclusion is not without support in judicial decision. At least two courts have also concluded that, in the light of *Gault* (387 U. S. 1, *supra*), due process demands that the proof in a delinquency proceeding be beyond a reasonable doubt. (See *In re Urbasek,* 38 Ill. 2d 535; *United States* v. *Costanzo,* 395 F. 2d 441; see, also, Dorsen and Rezneck, Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec., 1967] pp. 1, 25–27. But see, contra, *In re Wylie,* 231 A. 2d 81; *De Backer* v. *Brainard,* 183 Neb. 461, probable jurisdiction noted Feb. 24, 1969, — U. S. —, 37 U. S. Law Week 3301.) Thus, in the *Costanzo* case (395 F. 2d 441, *supra*), the Federal Court of Appeals for the Fourth Circuit declared (pp. 444–445):

> "Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional

> commitment must be regarded as 'criminal.' We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. [Case cited.] The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult.*** In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection.***
>
> "It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same."

And in the *Urbasek* case (38 Ill. 2d 535, *supra*), the high court of Illinois, noting that the language of the opinion in *Gault* "exhibits a spirit that transcends the specific issues there involved" (p. 541), wrote that (pp. 540–541)

> "*** it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that *a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged.* [p. 540]
>
> "*** When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution *** we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics.*** the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal prisons. [p. 541] " (Emphasis supplied.)

It may well be, as the court observes (opn., p. 202), that there is but a "tenuous difference" between "a fair preponderance of the evidence" and "proof beyond a reasonable doubt." But the simple fact is that the Family Court Judge in the case before us saw a difference between those standards. In reaching his decision that the appellant was guilty, he explicitly acknowledged that he was basing his findings of fact on the "preponderance of evidence" and frankly admitted that the proof fell short of establishing guilt or delinquency beyond a reasonable doubt. Along with Dorsen and Rezneck (Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec., 1967], 1, p. 27, *supra*), I too find it difficult to understand "how the distinctive objectives of the juvenile court give rise to a legitimate institutional interest in finding a juvenile to have committed a violation of criminal law on less evidence than if he were an adult."

It has been aptly said that the prosecution's duty to establish guilt beyond a reasonable doubt "is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" (*Leland* v. *Oregon*, 343 U.S. 790, 802–803, per FRANKFURTER, J., dissenting.) With the *Gault* case on the books, it follows, I suggest, that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process, as well as of equal protection, the case against him must be proved beyond a reasonable doubt.

The order appealed from should be reversed.

Judges SCILEPPI, BREITEL and JASEN concur with Judge BERGAN; Chief Judge FULD dissents and votes to reverse in a separate opinion in which Judges BURKE and KEATING concur.

Order affirmed.

THE COURT OF APPEALS
STATE OF NEW YORK

In the Matter of

SAMUEL W., *Appellant,*

THE FAMILY COURT OF THE STATE OF NEW YORK, *Respondent.*

Notice of Appeal to the Supreme Court of the United States

I

Notice is hereby given that Samuel W., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York entered on March 6, 1969, affirming an order of the Appellate Division of the New York Supreme Court, First Judicial Department, entered on June 6, 1968, which in turn affirmed an order of the Family Court, Bronx County, rendered on April 13, 1967, adjudicating appellant to be a juvenile delinquent.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was adjudicated a delinquent on the basis of a finding that he committed an act which if committed by an adult, would constitute the crime of larceny under the New York Penal Law. On April 13, 1967, he was placed in the New York State Training School for an initial period of eighteen months. Placement was extended for one year as of October 13, 1968, pursuant to § 756 of the Family Court Act which permits such yearly extensions, in the discretion of the Family Court judge, until appellant's eighteenth birthday.

II

The Clerk of the Court will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(1) Petition of Delinquency, including all endorsements thereon;

(2) Determination of fact-finding entered in the Family Court on March 30, 1967;

(3) Minutes of the Family Court fact-finding hearing of March 30, 1967;

(4) Order of Appellate Division, First Department, entered June 6, 1968;

(5) Order of the Court of Appeals affirming the Order of the Appellate Division;

(6) Opinion of the Court of Appeals;

(7) Notice of Appeal to the Supreme Court of the United States.

The following question is presented by this appeal:

Whether Section 744 of the New York Family Court Act, Both on Its Face and as Applied in This Case, Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment in That It Provides for an Adjudication of Juvenile Delinquency and Confinement in a State Training School Until a Juvenile's Eighteenth Birthday Upon a Mere Preponderance of the Evidence.

Yours, etc.,

Dated: New York, N. Y.
March 27, 1969

WILLIAM E. HELLERSTEIN
Counsel for Appellant
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100 Centre Street
New York, New York 10013

To: HON. RAYMOND J. CANNON, Clerk
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AFFIDAVIT OF SERVICE
(omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 85 Misc., October Term, 1969

In the Matter of
SAMUEL WINSHIP, *Appellant.*

UPON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 27, 1969

SUPREME COURT OF THE UNITED STATES

No. 85 Misc., October Term, 1969

• • •

APPEAL from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellante docket as No. 778 and placed on the summary calendar.

October 27, 1969

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FILE COPY

(39452)

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

JURIS. STATEMENT NOT PRINTED

No. ~~1780~~ ~~[illegible]~~

No. 778

In the Matter of

SAMUEL WINSHIP,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 1790

In the Matter of

SAMUEL WINSHIP,

Appellant.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The appellee, pursuant to a request of the Court transmitted by its Clerk, moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that some of the questions presented were not raised in the Courts below and all of them are so unsubstantial as not to need further argument.

ARGUMENT

Due process of law and the equal protection of the law do not require that the acts alleged in a juvenile delinquency petition be proved beyond a reasonable doubt. Section 744(b) of the New York Family Court Act, which requires that the finding of facts be based upon a preponderance of the evidence, is constitutional.

(1)

Under New York law, a juvenile delinquent is a person under sixteen years of age who has committed an act

which if done by an adult would constitute a crime and who, in addition, requires supervision, treatment or confinement (Fam. Ct. Act, §731). Both the finding that the act was committed by the child and the determination that he is in need of supervision, treatment or confinement must be based upon a preponderance of the evidence adduced at successive fact-finding and dispositional hearings (Fam. Ct. Act, §§744(b), 745(b)). A failure of proof at either stage requires dismissal of the delinquency petition.

In the case at bar, the appellant seeks a declaration of unconstitutionality of Section 744(b) of the Family Court Act which sets forth the permissible standard of proof at the fact-finding hearing. That standard was accepted in *People* v. *Lewis,* 260 N. Y. 171 (1932), cert. den. 289 U. S. 709 (1933), and even the strongly worded dissent did not disagree on this point. It is the commonly accepted rule. Note, *Juvenile Delinquents: The Police State Courts, and Individualized Justice,* 79 Harv. Law Rev. 775, 795 (1966).

The appellant contends, however, that the standard of proof in delinquency hearings must be identical to the criminal law burden of proving guilt beyond a reasonable doubt. Essentially, the argument is that, where loss of liberty is possible, due process of law forbids the imposition of a lesser standard. In addition, it is urged that it would be a denial of equal protection of the laws to provide the juvenile with less protection than is afforded the accused adult offender. Accordingly, the appellant asserts that he was denied his constitutional rights because the hearing judge was authorized to, and did, make his finding on the basis of the supposedly unconstitutional "preponderance" test.

The argument, though forceful, is not conclusive. That it deserves careful scrutiny is a reflection of the recently

awakened and wholly justifiable judicial interest in juvenile court proceedings evidenced by the landmark decision in *In re Gault*, 387 U. S. 1 (1967). That case, however, does not mandate the result sought herein. Indeed, this Court in *Gault* emphatically stated that its decision indicated no opinion on those issues, including the correct burden of proof, which were not then being decided. *In re Gault, supra,* at pp. 10-12. Moreover, subsequent cases which have dealt with the issue have not done so persuasively or in depth. See *e.g., United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir., 1968); *Santana* v. *State,* 431 S. W. 2d 558 (Civ. App. Tex., 1968, not officially reported); *In re Urbasek,* 38 Ill. 2d 535, 232 N. E. 2d 716 (Ill. 1967) and *In re Wylie,* 231 A. 2d 81 (D.C.C.A., 1967). In addition, as we shall show, the dictates of essential fairness and sound policy do not require the incorporation of this particular rule of criminal law into New York delinquency proceedings.

Initially, however, it should be noted that the appellant's plea for reversal cannot be entertained at all unless it is first demonstrated that the reasonable doubt rule is an element of due process of law as applied to adults accused of crime.

The Court in *Gault* was not dealing with particular statutory protections for criminal defendants that might be beneficial to juveniles charged with delinquency. What was before the Court was not a question of equal protection of the laws, but one of due process of law. Certain essential ingredients of due process, it was held, must be afforded the juvenile. These include the right to notice, counsel, cross-examination and the privilege against self-incrimination. The guarantee of these rights, however, does not mean that a delinquency hearing "must conform with all of the requirements of a criminal trial or even of

the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment'" 387 U.S. at p. 30, quoting *Kent* v. *United States,* 383 U.S. 541, 562 (1966).

Employing this approach, the Court refused to rule that Arizona's denial of a right of appeal in juvenile cases was unconstitutional. The Court noted that a right to appellate review is not required by the Constitution. Yet, such a right was granted by Arizona to convicted criminals, and that right is surely an important one. 13 Ariz. Rev. Stat. 713 (1959). What we are left with, then, is the inevitable conclusion that only those criminal law rights which are of constitutoinal dimension and part of due process of law are eligible for mandatory inclusion in juvenile proceedings. As we shall show, this does not mean that if it is a rule of constitutional law for adults it must be granted to juveniles; it does mean that such a holding is a necessary prerequisite.

(2)

At the outset, it might be useful to explore the concept of reasonable doubt as used in criminal cases. Interestingly, although some federal and state criminal cases contain language to the effect that the rule is an ingredient of due process of law,* there seems to be no square holding that the requirement of proof beyond a reasonable doubt is of constitutional dimension. While such a holding would not be dispositive of the instant case, it ap-

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* See e.g. *Government of Virgin Islands* v. *Lake,* 362 F. 2d 770, 774 (3d Cir., 1996); *Government of Virgin Islands* v. *Torres,* 161 F. Supp. 699 (D.C., V.I. 1958); *People* v. *Terra,* 303 N. Y. 332, 334 (1951); *State* v. *Dantonio,* 18 N.J. 570, 115 A. 2d 35 (1955); *State* v. *Kelly,* 218 Minn. 247, 15 N W 2d 554, 560 (1944); *People* v. *Licavoli,* 264 Mich. 643, 250 N.W. 520 (1933).

pears that the right to o proof beyond a reasonable doubt in criminal cases as an n element of due process has yet to be authoritatively estab blished.

Of course, it might b be argued that, since the rule has such widespread accept ptance, the occasion for conclusive adjudication has not ar arisen and this fact itself is signifi- cant. Notwithstanding g this possibility, troublesome ques- tions are present. For or, when we examine the judicial treatment of the rule, it it is apparent that there is a sharp distinction between wh what courts say about the require- ment of proving guilt lt beyond a reasonable doubt and how they behave in im implementing it. Further doubt is raised when we contras ast the judicial approach to reason- able doubt questions a and burden of proof problems in general with the appr roach to other criminal law rights which are unquestionab bly of constitutional status.

What seems clear is s that implementation of the rule is not placed on the level el of constitutional law. What due process of law does req quire was set forth by the Supreme Court in *Thompson* v. *Louisville*, 362 U. S. 199 (1960), where the Court held th that it is a violation of due process to convict and punish a a man without any evidence what- soever of his guilt. Tha hat is, to be constitutionally valid, a conviction must be supp pported by *some* evidence, not neces- sarily evidence proving g guilt beyond a reasonable doubt.

Cases involving real l questions of constitutional import are treated in a marked edly different fashion. For example, when confronted with a a claim that a book is or is not ob- scene or that a confessi sion is or is not coerced, this Court does not limit its func ction to a determination that there is some evidence or ev even that there is adequate or suffi- cient evidence to supp port the finding that the confession was voluntary or that at the book was obscene. On the contrary, the Court de denies that it is at all bound by the

jury's conclusions. Indeed, it regards itself as obligated to make its own independent evaluation of the record in determining whether these particular constitutional rights have been violated. *Jacobellis* v. *Ohio,* 378 U. S. 184, 187-190 (1964); *Haynes* v. *Washington,* 373 U. S. 503, 515-516 (1963). And this holds even if the jury has been meticulously instructed on the law of confessions or the law of obscenity.

The reason for this approach is evident. Whether or not the will has been overborne so as to culminate in a confession is a factual question. Yet, because a man has a constitutional right not to be coerced, the Court will reach its own determination, notwithstanding the judgment of the jurors. The degree of pruriency expressed in a book would also seem to be a question capable of final resolution by the fact finders. But the demands of free expression require the Court to rely on its own judgment. No similar independent evaluation of the record is made to determine whether guilt has been proved beyond a reasonable doubt. As the Court has held, the 14th Amendment does not provide for review of mere error in jury verdicts. *Lyons* v. *Oklahoma,* 322 U. S. 596 (1944). On the other hand, the Court holds that such a review is required where it is claimed that constitutional rights have been impinged upon. Thus, if there truly were a constitutional right not to be convicted unless guilt has been proved beyond a reasonable doubt, there would seem no basis for providing a lesser mode of review than when faced with other claims of due process violations.

At this point it might be argued that a distinction must be made between the choice of the correct standard of proof and the role of a reviewing court. Once the burden has been properly imposed, the appellate court's function is severely limited [*Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276 (1966)], and it is only

the formulation of the standard that raises a constitutional issue.

But this approach merely begs the question, for it fails to tell us how we ascertain which standards and burdens are constitutionally ordained and which are not. In federal deportation, expatriation and denaturalization cases, for example, the Court, while noting the important personal interests at stake, has formulated a standard of proof ("clear, unequivocal and convincing") as an exercise of its judicial rule-making function, without regard to any explicit constitutional right. [See e.g., *Woodby* v. *Immigration and Naturalization Service, supra; Schneiderman* v. *United States,* 320 U. S. 118, 124-125 (1943); *Nishikawa* v. *Dulles,* 356 U. S. 129, 134-135 (1958); *Gonzales* v. *Landon,* 350 U. S. 920 (1955).]

Conversely, in *Speiser* v. *Randall,* 357 U. S. 513 (1958), the Court struck down a State denial of a tax exemption based upon a statute which imposed upon the taxpayer the burden of proving that he did not criminally advocate the unlawful overthrow of the government. It did so, not because of some abstract notion about burden of proof, but because the State, by placing the burden of persuasion on the claimant, violated his right to freedom of speech—a constitutional right protected by the due process clause of the 14th Amendment. Due process of law also requires, as we have seen, some evidence of guilt. A statutory presumption which practically eliminates the need to produce some evidence of guilt would therefore be violative of due process. *Tot* v. *United States,* 319 U. S. 463, 473 (1943) (concurring opinion of BLACK, J.).

The difference would seem to be this: the imposition of a particular burden or standard of proof and persuasion is constitutionally required where its purpose is to protect a right which is itself of constitutional weight. The

question of whether a defendant's guilt has been proved by a particular quantum of evidence is not viewed by the Courts as a constitutional question. Hence, since the reasonable doubt standard is not intended to protect a constitutional right, it is not itself of constitutional dimension.

(3)

Nothing said thus far is intended to deny the importance and significance of the reasonable doubt rule in criminal cases. Although it has been said that the rule did not appear until the end of the 18th century and was applied at first only in capital cases [9 WIGMORE, *Evidence,* §2497 (3d Ed., 1940); MCCORMICK, *Evidence,* 681-682 (1954)], it has become a settled standard of the criminal law. *Holland* v. *United States,* 348 U. S. 121 (1954).

Essentially appellant's argument would appear to be that, as a matter of constitutional law, nobody may be incarcerated unless the proof leading to the determination which is the basis for the incarceration is established beyond a reasonable doubt. Even if such proof is constitutionally required in criminal cases, it does not follow that the Constitution imposes the identical requirement in all situations which may lead to incarceration. In New York, for example, the standard of proof in civil contempt proceedings is "reasonable certainty" [*Ketchum* v. *Edwards,* 153 N. Y. 534, 539 (1897)], which is a lesser standard than reasonable doubt. *People* v. *Cotto,* 28 A D 2d 1116, 1117 (1967).

Similarly, the reasonable doubt rule does not appear to be applicable to civil proceedings which lead to confinement of drug addicts. See *Robinson* v. *California,* 370 U. S. 660 (1962); *In re De La O,* 59 Cal. 2d 128, 378 P. 2d 793 (1963), cert. den. 374 U. S. 856 (1963). Nor does

such a requirement appear to be applied in civil proceedings to commit the insane.

(4)

When we examine the Family Court Act, it is apparent that the fact-finding hearing is not the juvenile delinquency equivalent of a criminal trial. In criminal cases, sentencing follows upon a verdict of guilt. Proof of the need to confine, treat or supervise the defendant need not be forthcoming and there is no evidentiary standard that must be met. The extent of punishment is discretionary within the permissible limits set by the statute. Barring an abuse of discretion, the punishment imposed stands as a legitimate consequence of the commission of the criminal acts. Indeed, even under statutes which have permitted the question of punishment—i.e. the issue of life imprisonment or death—to be submitted to a jury, the prosecution bears no burden of proof whatsoever. *People* v. *Dusablon*, 16 N Y 2d 9, 18 (1965); *People* v. *Mardavich*, 287 N. Y. 344 (1942).*

In letter, spirit and practice the Family Court approach is entirely different. Notwithstanding the commission of criminal acts, no juvenile may be adjudicated a delinquent until it is demonstrated at a dispositional hearing by a preponderance of the evidence that he requires supervision, confinement or treatment. Fam. Ct. Act, §745. Absent such proof, the petition must be dismissed. And petitions are dismissed on this very ground: in one year a total of 3,418 petitions out of a

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* Only under the most unusual circumstances, where the statute itself mandates a further proceeding, is additional proof required. See e.g., *Specht* v. *Patterson*, 386 U. S. 605 (1967); *People* v. *Bailey*, 21 N Y 2d 588 (1968).

total of 10,755 processed were dismissed for failure of proof. Of those dismissals, 1,176, or nearly 35% of the total dismissed, were dismissed for failure of proof at the dispositional hearing [12th Ann. Rep. Judicial Conference 314 (1967)]. A similar result is impossible in the criminal law. Even where the adult receives a suspended sentence, the indictment and conviction stand and he remains branded a criminal.

Hence, it can be said that the juvenile enjoys a substantial benefit denied to the adult offender since the fact-finding hearing does not stand in the same relation to an ultimate adjudication and confinement as does the criminal trial. New York, therefore, meets the test posed by the Supreme Court in *Kent* v. *United States,* 383 U.S. 541 (1966), the forerunner of *Gault,* as to whether there is "any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae* evidencing • • • special solicitude for juveniles • • •" *Id.* at 551-552.

In sum, what we have in New York, is a frank recognition that when dealing with children no intervention of any sort on the part of the State is justified unless a need for such intervention is demonstrated by adequate proof. If the proof fails, the State's interest ceases. No adult criminal is so protected. This is, indeed, an impressive libertarian principle. PAULSEN, *The New York Family Court Act,* 12 Buff. L. Rev. 420, 437 (1963). In short, the protection afforded the juvenile in New York in the resolution of the question of whether he should be deprived of his freedom is not equal to that given the adult; it is, in a sense, greater.

CONCLUSION

The appeal from the Court of Appeals of the State of New York should be dismissed.

July 3, 1969.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel of the City of New York,
Counsel for Appellee.

Stanley Buchsbaum,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

IN THE MATTER OF SAMUEL W.

v.

FAMILY COURT OF THE STATE OF NEW YORK

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF FOR THE NEIGHBORHOOD LEGAL SERVICES PROGRAM OF WASHINGTON, D.C. AND THE LEGAL AID AGENCY FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

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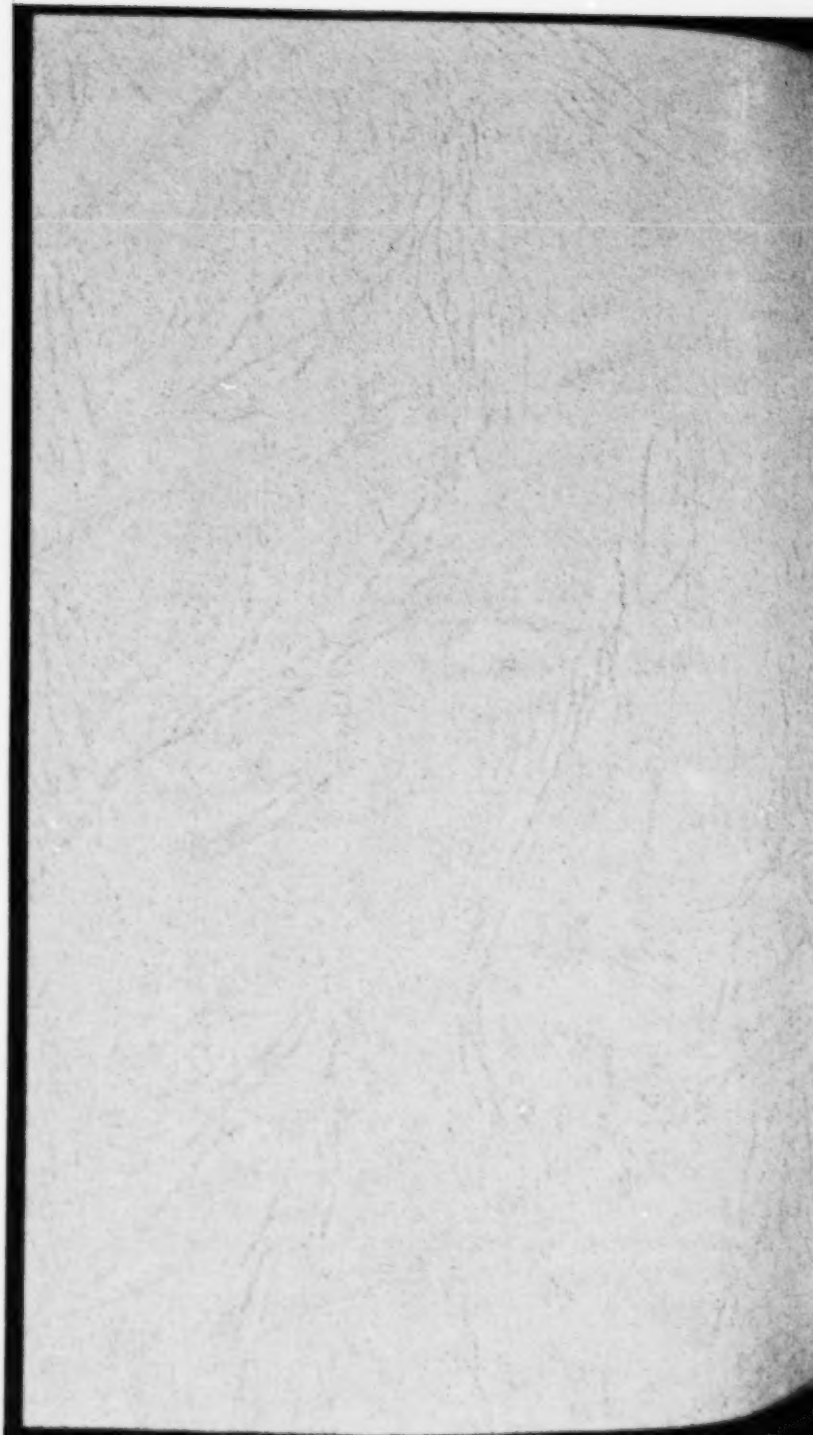

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IN THE MATTER OF SAMUEL W.

v.

FAMILY COURT OF THE STATE OF NEW YORK

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF FOR THE NEIGHBORHOOD LEGAL SERVICES PROGRAM OF WASHINGTON, D.C. AND THE LEGAL AID AGENCY FOR THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

The Neighborhood Legal Services Program of Washington, D.C. and the Legal Aid Agency for the District of Columbia file this brief *Amicus Curiae* pursuant to consent of the parties hereto, submitted herewith.

INTEREST OF *AMICUS CURIAE*

Neighborhood Legal Services Program (NLSP) of Washington, D.C. is a legal service program funded by the Office of Economic Opportunity. The 10 field offices of this program handle the cases of indigent juveniles in the nation's capitol. They handle several hundred of these cases each year. The burden of proof standard applied by the District of Columbia Juvenile Court in both court and jury trials is "a mere preponderance of the evidence." Several cases handled by NLSP attorneys which argue that the preponderance

standard be changed to "beyond a reasonable doubt" are pending in the United States Court of Appeals for the District of Columbia. Since the vast majority of juveniles who come before the nations' juvenile courts are without funds to pay for legal services, the ruling in this case will have an enormous impact on juvenile proceeding in the District and throughout the country.

The Legal Aid Agency is required by statute to represent youths charged with delinquent conduct in the District of Columbia Juvenile Court. D.C. Code §2-2202 (1967). During fiscal 1969 for example, Agency attorneys appeared in approximately 1500 delinquency cases. The Agency firmly believes that justice in the District of Columbia Juvenile Court would be enhanced if "beyond a reasonable doubt" were the standard of proof to be applied in cases involving determinations of delinquency. Litigation aimed at eliminating the present, civil standard of proof in juvenile cases involving criminal offenses has been pursued in the past by Agency attorneys, and an Agency case in which this issue is presented is currently on appeal before the United States Court of Appeals for the District of Columbia.

QUESTION PRESENTED

Whether a youth who is charged with committing a criminal offense, the conviction for which may result in a prolonged period of institutional confinement and which, if he were an adult, would constitutionally require proof beyond a reasonable doubt, is deprived of his liberty without due process of law or denied equal protection of the laws when he is convicted of delinquency by a "mere preponderance of evidence?"

SUMMARY OF ARGUMENT

A youth who is charged with committing a criminal offense, the conviction of which may result in a prolonged period of institutional confinement, and which, if he were an adult would constitutionally require proof beyond a reasonable doubt, is deprived of his liberty without due process of the law and denied equal protection of the laws when he

is convicted of delinquency by a mere preponderance of the evidence.

Beyond a reasonable doubt has always been the standard of proof required for a conviction in an adult criminal proceeding. The reason for the application of this standard is that an individual whose liberty and freedom may be taken away must be presumed innocent until the Government is able to prove, by facts which leave no reasonable doubt in the mind of the factfinder, that he is guilty of the offense with which he has been charged.

A juvenile is deprived of his liberty when he is convicted of committing a criminal offense. A conviction often results in the youth being detained in an institution which is understaffed and ill-equipped, and which fails to provide the juvenile with an effective rehabilitative program. While the great juvenile experiment had not failed, many of the laudatory goals which it sought to achieve have not been attained in fullest measure. Even the stigma attached to a finding of delinquency subjects the convicted youth to a variety of disabilities which juvenile court statutes euphemistically assert do not attend the juvenile's conviction.

Enlightened judicial and legislative opinion, as well as many commentators, recognize the necessity for adoption of the reasonable doubt standard. The very fact that some youths are accidentally afforded the reasonable doubt standard through their discretionary transfer to an adult court by the juvenile court dramatizes the unequal treatment provided those youths who are prevented from realizing a constitutional right, apparently because they are considered "good" enough to warrant the benefits of a proceeding conducted in the juvenile court.

The preponderance standard conflicts with a youth's assertion of his privilege against self-incimination, a privilege extended to juveniles in *Gault*. Few youths would not feel compelled to take the stand on their own behalf in order to contradict the evidence presented by the Government which must only demonstrate the factfinder that its case is "more convincing" than the youth's.

By adopting the reasonable doubt standard the rehabilitative purposes of the juvenile court are in no way jeopardized. Indeed, application of the criminal standard to cases involving youths charged with the commisson of a criminal offense will allow, at the post-adjudicatory stage, convicted juveniles who are in real need of treatment to derive the greatest benefit from the meager resources presently available for rehabilitation; providing a greater chance of saving such youths from returning to society as hardened criminals.

ARGUMENT

I.

THE FAILURE TO AFFORD A YOUTH THE RIGHT TO BE ADJUDICATED A DELINQUENT BY PROOF WHICH LEAVES NO REASONABLE DOUBT THAT HE COMMITTED THE CRIMINAL OFFENSE WITH WHICH HE IS CHARGED IS A DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS AND A DENIAL OF EQUAL PROTECTION OF THE LAWS.

Both the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the application of the criminal standard of proof in juvenile delinquency proceedings. The "criminal" aspects of a juvenile court determination, the stigmatizing effect of a conviction and the characteristic ease with which transfer to an adult court may take place sharply dramatize the need for according juveniles the same standard of proof protection which has long been considered a constitutional safeguard for adults.

The deprivation of a child's liberty as a result of a conviction of a criminal offense is so severe that there no longer appears to be any justification for denying the application of the higher standard. Indeed, the poor institutional rehabilitation that juveniles generally receive makes it more imperative that a youth be accorded at least the same protection given an adult when the youth is charged with acts the conviction of which may result in his prolonged, and often-

times repressive, incarceration. In considering the necessity for the application of the adult standard of proof in criminal cases, one is reminded of Mr. Chief Justice Warren's assertion in 1964 that:

> "After all, what we are striving for is not merely 'equal' justice for juveniles. They deserve much more than being afforded only the privileges and protections being afforded their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progress of future generations."[1]

A. An Individual Convicted Of Committing A Criminal Offense Is Deprived Of His Liberty Without Due Process Of Law Unless The Case Against Him Is Proved Beyond A Reasonable Doubt.

It is true that the requirement that a man be proved guilty beyond a reasonable doubt finds no explicit constitutional expression. Nevertheless, it has long been regarded as an essential ingredient and one of the fundamental principles of American jurisprudence that an individual's liberty may not be deprived without proof beyond a reasonable doubt. As McCormick has noted:

> "This demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." McCormick, *Evidence* § 321 (1954).[2]

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[1] Address by Mr. Chief Justice Warren, The National Council of Juvenile Court Judges, Vol. 15, No. 3, Juv. Ct. Judges J. 14, 16 (1964).

[2] McCormick cites as authority for this statement, Thayer, *Preliminary Treatise on Evidence* 558-9 (1898), which in turn quoted passages from Coke's 3rd Institute. The first articulation of the standard came in the high treason cases of 1798 in Dublin as reported by McNally, *Rules of Evidence on Pleas of the Crown* (1802).

(Continued)

At a very early point in our nation's judicial history we see an unequivocal acceptance of "beyond a reasonable doubt" as the applicable standard of proof in criminal prosecutions. So universal has been its acceptance that not a single case can be found in the law books rejecting that standard.

Several decisions of this Court in the nineteenth century have applied and interpreted the reasonable doubt standard in both federal and state criminal cases. For example, in *Miles v. United States*, 103 U.S. 304 (1880), a federal prosecution for bigamy, this Court said, at 312:

> "The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt."[3]

More recently, in *Brinegar v. United States*, 338 U.S. 160 (1949), this Court indicated:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. 338 U.S. at 174."[4]

See also May, *Reasonable Doubt in Civil and Criminal Cases*, 10 Am. L. Rev. 642, 656-7 (1876).

[3]*See* Hopt v. Utah, 120 U.S. 430, 439-42 (1887); Dunbar v. United States, 156 U.S. 185, 198-9 (1895); Coffin v. United States, 156 U.S. 432, 460 (1895); Davis v. United States, 160 U.S. 469, 493 (1895); Agnew v. United States, 165 U.S. 36, 51-2 (1897); Holt v. United States, 218 U.S. 245 (1910), as well as the state court cases cited in *Hopt* which applied the reasonable doubt standard. *See also* State v. Santana, 444 S.W. 2d 614, 626-27 (Tex. 1969).

[4]Even in the subsequent case of Leland v. Oregon, 343 U.S. 790, *reh. denied*, 344 U.S. 848 (1952), where the Court found it constitutionally permissible for a state to shift the burden of proof to the defendant on an insanity defense, the Court reiterated that the overall

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And in *Speiser v. Randall*, 357 U.S. 513, 525-26, *reh. denied*, 358 U.S. 860 (1958), this Court said again:

> "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208; *United States v. New York, N.H.& H.R. Co.* 355 U.S. 253; *Sampson v. Channell*, 110 F.2d 754, 758. There is always in litigation a margin of error, representing error in factfinding which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden or producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."[5]

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burden of proving guilt beyond a reasonable doubt lay on the prosecution. 343 U.S. at 799. Frankfurter, J., dissenting in that case said:

> "... From the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of the jurors. It is the duty of the Government to establish guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic procedural content of 'due process'. 343 U.S. at 802-03.

[5] *Accord*, Lilienthal v. United States, 97 U.S. 237 (1878); Leland v. Oregon, 343 U.S. 790, dissenting opinion of Frankfurter and Black, *reh. denied*, 344 U.S. 848 (1952); Brooks v. United States, 164 F.2d 142 (5th Cir. 1947); Shaw v. United States, 174 Ct. Cl. 899, 357 F.2d 949 (1966); Government of Virgin Islands v. Torres, 161 F.Supp. 699 (D.V.I. 1958); People v. Licovoli, 250 N.W. 520 (Mich. 1933); People *ex rel* Schubert v. Pinder, 9 N.Y.S.2d 311 (Sup. Ct. 1938); State v. Dantonio, 115 A.2d 35 (N.J. 1955). *See also In re*

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It should be remembered that, during the period when the reasonable doubt standard was first articulated by the Courts, children over the age of seven were tried and treated as adults. They, too, were the recipients of this fundamental procedural safeguard.[6]

In sum, the reasonable doubt standard, while it had not yet been definitely articulated at the founding of our nation, evolved gradually into a universally-accepted element of common law criminal due process. This is reflected in many opinions of this Court. The history of criminal procedure in our country discloses no territroy, state, or federal court that has even attempted to change that standard, since it is so embedded in our notions of criminal due process.

The real question, therefore, is whether a conviction[7] of an offense in a juvenile proceeding can be considered "crim-

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M, 450 P.2d 296, 801 (Cal. 1969); State v. Arenas, 453 P.2d 915, 917 (Ore. 1969) (*en banc*). Both cases refused to extend the reasonable doubt standard to juvenile delinquency adjudications. *See* pp. 21-25, *infra*. Nonetheless, each recognized that an adult's right to be found guilty by the higher standard is a right which is inherent in the Due Process Clause of both the federal and its own state constitutions. *See also* 2 Inbau, Thompson & Sowle, *Cases and Comments on Criminal Justice* 1145 (3rd ed. 1968): "An indispensable element of 'due process' is the requirement that guilt be proved 'beyond a reasonable doubt.'"

[6]But there is no trace of the doctrine of parens patriae in the history of criminal jurisprudence. At common law, children under seven were incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults." *In re* Gault, 387 U.S. 1, 16 (1967).

[7]It is true that in the instant case the Court of Appeals insisted that the proceedings were not criminal because, even if the juvenile is incarcerated, the relevant statutory provision asserts that his adjudication is technically not a "conviction" and affects no right or pri-

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inal" in the traditional sense that a youth loses his liberty. To be sure, it was never intended that a determination of delinquency in a juvenile proceeding would ever assume the characteristics of a criminal adjudication. In fact, after the emergence of the doctrine of "parens patrise,"[8] and until the profound changes wrought in juvenile cases by the decision in *In re Gault*, 387 U.S. 1 (1967) most courts accepted without question the assumption that juvenile proceedings were civil, not criminal. They were concerned solely with promoting the child's rehabilitation, not punishing his criminality. Indeed, the intention in creating juvenile courts was laudatory: to remove all taint of criminality from the child's unlawful activity. An adjudication of delinquency was never supposed to restrict the beneficial processes used to prevent a youth from "copping out" of society, nor from losing faith that his elders were giving him a fair shake at readjusting to it. It followed that the customary constitutional safeguards were unnecessary for and inappropriate to determining the best interests of the child.[9]

But insofar as the assumptions upon which this paternalistic view rest are unfounded, and insofar as procedures preserving the essential fairness of a juvenile proceeding are not inconsistent with the goals of the juvenile court, the youth should and must be accorded constitutional safeguards. It is therefore necessary to examine these assumptions.

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vilege. This type of provision is typical. *But see, e.g.*, D.C. Code § 3-120 (1967), which seems to implicitly recognize that a hearing on delinquency is in the nature of a criminal proceeding. *See also* Uniform Juvenile Court Act § 2(2)(1968) and text accompanying notes 17-18, 32, *infra*.

[8]State v. Dunn, 99 P. 278, 280 (Ore. 1909).

[9]*See, e.g.*, People v. Lewis, 183 N.E. 353, 355 (N.Y. 1932); *In re* Bigesby, 202 A.2d 785-786 (D.C.Ct.App. 1964); *In re* McDonald, 153 A.2d 651 (D.C.Ct.App. 1959).

B. A Convicted Juvenile Delinquent Is Deprived Of His Liberty In The Same Manner, And With The Same Consequences, As An Adult Criminal.

One basic reason for not providing "criminal" safeguards in juvenile proceedings has been that any resulting confinement is directed to rehabilitation, not punishment. The approach taken by the District of Columbia Courts is indicative of the traditional view. For example, in *In re Elmore*, 222 A.2d 255 (D.C. Ct. App. 1966), *modified*, 382 F.2d 125 (D.C. Cir. 1967), in which a 13 year old child was found to be delinquent, the District of Columbia Court of Appeals euphemistically asserted that:

> "A delinquent child is neither considered nor treated as a criminal but as a person needing guidance, care, and protection. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which forms the historical background of the Juvenile Court Act . . . [t]he investigation and court proceedings involving the determination of a child's delinquency are directed to the status and needs of the child, and the disposition thereof has as its goal not punishment but the rehabilitation and restoration of the child to useful citizenship. The end result is that a child should not be labeled a criminal, he is not punished as a criminal, and the proceedings against him should be far removed from the characteristics of criminal trial" 222 A.2d at 257-8.[10]

The premise that juvenile confinement is rehabilitative, versus punitive, in nature needs reexamination. For, not only is most criminal confinement also directed, at least in part, toward rehabilitation,[11] but also there is reason to question

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[10]It should be pointed out, however, that in this case the court was not dealing with a boy who had committed any specific antisocial offense, but rather with one whose "habitual" course of conduct placed him beyond the control of his mother.

[11]*See, e.g.*, State v. Arenas, 453 P.2d 915, 918 (Ore. 1969) (*en banc*). Although the court refused to require the adoption of the adult standard of proof to determinations of delinquency, it noted:

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whether the confinement of youths has the desired rehabilitative effect. There is competent evidence to suggest that the original objectives of the juvenile court system have not been effectively accomplished.[12] Institutions which house convicted delinquents often fail to provide an adequate form of treatment for the youths.[13] In fact, in *Kent v.*

"... Aspects of the juvenile law which at its inception made it substantially different from the criminal law are now also present in the criminal law as it exists today in Oregon. Today in the criminal law as well as in the juvenile law the court attempts to find out as much as possible about the individual defendant before making any disposition of the case. In the criminal law as well as the juvenile law the court makes a disposition which is most likely to rehabilitate the individual and permanently remove him from the ranks of crime."

[12]*See In re Gault*, 387 U.S. at 26; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 665-76, 686-87, 773 (1966).

[13]*See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967):

"[F]or nearly half the Nation's population there is no detention facility except the county jail, and many of the jails used for children are unsuitable even for adult offenders."

As recent as March 7, 1969, The Washington Post reported on the testimony given by Joseph R. Rowan, former Federal delinquency consultant and now director of the John Howard Association of Illinois, before the juvenile Delinquency Subcommittee of the Senate Judiciary Committee in which Mr. Rowan:

"... emphasized his opinion that treatment of delinquents in institutions for children was no better, and probably more negligent, than in most adult prisons. He called juvenile institutions 'crime hateries' where children are tutored in crime if they are not assaulted by other inmates or the guards first."

His testimony was given stark affirmation by the November 9, 1969 account in The Washington Post which reported on the charges made by the Justice Department that "overseers of an Alabama juvenile

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United States, 383 U.S. 541 (1966), the Supreme Court noted that:

> "While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults." 383 U.S. at 555.

However they may be characterized, the truly criminal nature of juvenile court proceedings becomes clear when one considers the consequence of a finding of delinquency on the personal liberty of the child. The importance of the issue of the child's loss of liberty cannot be underestimated. The decision in *Gault* was influenced in large part by the realization, confirmed by objective studies, that "whether it be called punishment or rehabilitation, the juvenile delinquent's confinement is no less a loss of liberty than the

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home 'freely and excessively' administer corporal punishment to 440 Negro youngsters." President Nixon, on November 13, 1969, also called on Attorney General Mitchell to institute a major prison reform drive in America. In a companion statement to his Directive, Mr. Nixon noted "In an appalling number of cases, our correctional institutions are failing." After citing a study indicating approximately a forty percent recidivism rate amongst adult criminals, President Nixon indicated that repeater rates were even greater among persons under twenty, "and there is evidence that our institutions actually compound crime problems by bringing young delinquents into contact with experienced criminals." The Washington Post, November 14, 1969, § A, at 2, col. 3. And on November 22, 1969 Former Justice Fortas speaking before the Juvenile Court Practice Institute in Washington, D.C. specifically attacked the practice of confining juveniles to institutions from which most he said, "emerge as hardened criminals . . . with improved skills as burglars, sex offenders, dope addicts and the like." The Washington Post, November 23, 1969, § A, at 23, col. 1.

adult criminal's."[14] Why, then, should the burden of proof standard necessary to convict a child of a violation of the law be an easier one to meet than the standard applied to a youth who may be only slightly older, if at all, and who is tried as an adult for the same offense?[15]

A Significant Body Of Respected Judicial Authority Considers The Application Of The Adult Standard To Juvenile Delinquency Determinations A Constitutional Requirement.

Although most courts continue to classify juvenile proceedings as civil, long ago some courts began noting their essentially criminal nature and the necessity for according the same safeguards to juveniles and adults alike. Until the instant case, the authority in New York was to this effect.[16]

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[14] 37 U. Cin. L. Rev. 851 (1968); *see Gault*, 387 U.S. at 27:

> "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or a lesser time."

[15] *See* D.C. Code § 11-1553 (1967); Neb. Rev. Stat. § 43-205.04 (1943) and similar provisions in other states under which a juvenile may be waived, at the court's or prosecutor's discretion, to a "criminal" court for trial as an adult. Relatively few procedural steps or substantive standards have ever been delineated for transfer of jurisdiction from a juvenile to an adult criminal court. Ketcham, *What Happened to Whittington?* 37 Geo. Wash. L. Rev. 324, 336 (1968). *See National Council of Juvenile Court Judges, Directory and Manual*, 301-46 (1963). *See also* the discussion of waiver in notes 68-75 and accompanying text, *infra*.

[16] *See In re* Madik, 251 N.Y.S. 765, 767 (Sup. Ct. 1931):

> "The facts, however, of the charge must be proved against the child *in the same way as if the charge were made against an adult;* that is, by competent evidence."
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> "In the case of an adult, proof of guilt beyond a reasonable doubt would be required. The district attorney concedes and we think that such proof is required here."

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In *Jones v. Commonwealth*, 38 S.E.2d 444 (Va. 1946), two boys were charged with a violation similar to breach of the peace. Jones allegedly had thrown a number of rocks and made loud noises in the late hours of the evening. A good deal of the evidence against the defendant was, however, vague and confused in some respects, uncertain in other respects, and contradictory in others.

A Virginia statute stated that:

> ". . . no power is given to the juvenile courts to convict any child of any crime, either misdemeanor or felony or to commit any child to any penal institution. Such court may only adjudge a child delinquent and commit him, not to a penal institution, but to the State Board of Public Welfare, which board is given power to make proper disposition of the child."[17]

See also People v. Fitzgerald, 155 N.E. 584, 587 (N.Y. 1927).

In *In re* James Rich, 86 N.Y.S.2d 308 (Dom. Rel. Ct., Child. Div. 1949), a 15-year-old boy was charged with the fatal stabbing of another boy. In discussing the burden of proof standard, the court remarked:

> "The rule of law is that a charge of crime must be established beyond a reasonable doubt. If there is a reasonable doubt as to the perpetration of the crime, that reasonable doubt must be resolved in favor of the person charged with having committed the act. *It is no less applicable to a child than it is to an adult.* In this case, the doubt I have is only as to the truth that was told; but in the last analysis, it is the result of speculation. And I have no right to speculate." [Emphasis added.] 86 N.Y.S. 2d at 311.

See also People v. Anonymous A, B, C and D, 279 N.Y.S.2d 540, 543 (Nassau County Ct. 1967), where the court held that the state had the "burden of proving beyond a reasonable doubt" that a 16-year-old boy had been guilty of stealing an automobile. The opinion in the instant case has repudiated the enlightened approach taken by both courts of first instance in *Madik* and *Anonymous*, as well as by the specialized court in *Rich*.

[17]Virginia Code ch. 78, § 1910 (1942).

Despite this explicit mandate, and while recognizing that the statute dealing with juvenile courts required a liberal construction in order to accomplish its beneficial purposes, the court was not reluctant to admit the basic criminal nature of the boys' trial. Following its flat assertion that a conviction of delinquency requires that "[g]uilt should be proved by evidence which leaves no reasonable doubt," the court added:

> ". . . the trial and punishment of minor offenders follows the regular criminal procedure, modified, in certain respects, by the statutes setting up juvenile and domestic relations courts." 38 S.E.2d at 447, quoting *Mikens v. Commonwealth*, 16 S.E.2d 641, 643 (Va. 1941).[18]

Spurred by *Kent* and *Gault*, several courts have recently acknowledged the basic, fundamental restraint on a youth's liberty affected by an adjudication of delinquency. They have begun to realize that, because of the kind of detention to which a convicted delinquent is subject, the beyond a reasonable doubt standard must be adopted to fully protect the child accused of being a delinquent.

In re Urbasek, 232 N.E.2d 716 (Ill. 1967), is an important decision which articulates one state's judicial disposition on the burden of proof standard. In that case, an 11 year old boy had been charged with murder. When the Illinois Court of Appeals first considered the case in 1966,

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[18]For other illustrations of the fact that courts and legislatures recognize the criminal nature of the act which a youth commits, *see, e.g., In re* Whittington, 233 N.E.2d 333, 342 (Ohio 1967) ("Commission of a crime"); N.Y. Family Court Act § 713 (McKinney 1962), para. (a) Committee Comments (juvenile delinquent defined as "one who commits a crime and requires official treatment"); D.C. Code § 3-120 (1967) (Juvenile Court has jurisdiction over "children 17 years of age who shall be convicted of petty crimes or misdemeanors which may be punishable with fine or imprisonment."); Uniform Juvenile Court Act § 2(2) (1968) ("delinquent act" defined as one "designated a crime under the law.") *See also Gault*, 387 U.S. at 49-50.

222 N.E.2d 233 (Ill. Ct. App. 1966), this Court had decided *Kent*, but not *Gault*. The Illinois Court initially ruled that beyond a reasonable doubt was not the proper standard of proof to be applied to juvenile proceedings. On review, however, and in light of the "transcendent spirit" of *Gault*, the Illinois Supreme Court upset the finding that the boy was delinquent.

The court acknowledged that Urbasek had not been denied any of the specific rights which *Gault* had extended to the adjudicatory stage of the juvenile court practice,[19] but held that application of any standard lower than "beyond a reasonable doubt" would dilute the effect of the guarantees which *Gault* assured for juveniles. To do so would not be consonant with due process or equal protection.[20] Moreover, it would not be constitutionally permissible, on a quantum of proof lower than the criminal standard, to subject a child to a loss of liberty equal to or greater than that which might be imposed on an adult for the commission of the same act.[21]

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[19] "While . . . the respondent . . . was denied none of the rights [required, under due process of law, to be applied to juvenile court proceedings after *Gault*], it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged." 232 N.E.2d at 719.

[20] *Id.*

[21] "Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." *Id.* at 719-20. The Illinois Court made clear that adherence to this reasonable doubt standard would not weaken the unique benefits of the Illinois Juvenile Court Act, nor would it require that this standard be applied in cases

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Five other recent state court decisions have specifically dealt with the burden of proof issue. The case of *State v. Santana* involved a 14 year old boy charged with rape. The intermediate Court of Appeals, per its Chief Justice, 431

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alleging a violation of an ordinance (violation leading to a fine), since no "possible loss of liberty for years" might result, as in an adjudication of delinquency. *Id.* at 720. *See In re* Smith, 326 P.2d 835 (Crim. Ct. App. Okla. 1958), in which the court decided that, for purposes of establishing the requisite burden of proof in a determination of delinquency, a child must be accorded *all the safeguards* of a criminal trial where an unfavorable determination may result in detention amounting to "grave" consequences. The clear implication of that holding is that when grave consequences may result from a finding of delinquency the determination must be made on the basis of the beyond a reasonable doubt standard. As in *Smith*, the youth in the instant case faced the possibility of incarceration for a substantial number of years. The court noted at 839: "We are of the opinion rules of procedure in a juvenile proceeding, where the life and liberty of the juvenile delinquent is at stake, should be measured by the gravity of the situation and the exigencies the case may impel. The ordinary rules established and the regular processes provided to produce evidence and to aid the court in testing and weighing it are not to be scrapped because the proceeding is a summary one and findings of facts must not rest upon hearsay. [Citation omitted.] Certainly a juvenile should be subjected to no less protection than an adult. The law throws every safeguard around the rights of an accused adult and his enjoyment of those rights." *See also* People *ex rel.* Rodello v. District Court, Denver County, 436 P.2d 672-76 (Colo. 1968), in which the court remarked that the application of the reasonable doubt standard would not convert a juvenile proceeding into a criminal one. *Cf.* Reed v. Duter, No. 17546 (7th Cir. Sept. 18, 1969), 6 Crim. L. 2081. Although the standard of proof was not in issue the court suggested that "under *Gault*, there can be no constitutionally permissible discrimination between the adult prisoner and the juvenile defendant held in state custody." The Seventh Circuit remarked further that:

> "*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty, all constitutional safeguards of the Fifth and Sixth Amendments to the Constitution of the United States which apply, by operation of the Fourteenth Amendment, in criminal proceedings."

S.W.2d 558 (Tex. Civ. Ct. App. 1968), held that the Constitution required the state to prove an act of delinquency beyond a reasonable doubt in proceedings which may result in the youth being institutionalized:

> "[T]he underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proved beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions. We believe this is the clear and unmistaken effect of that decision. In so holding, we are in agreement with the interpretation of the *Gault* case by the Supreme Court of Illinois in *In re Urbasek*." 431 S.W.2d at 560.

But the Texas Supreme Court reversed the lower court and retained the civil, preponderance test. 444 S.W.2d 614 (Tex. 1969). After reviewing the split on this precise question in other state and federal courts, and after noting that "[t]he facts in *Gault* were extreme," the court chose to allow the lower standard because "*Gault* does not require that the juvenile trial be adversary and criminal in nature." 444 S.W.2d at 622.

Justice Pope, writing for three dissenters in *Sanatana*, 444 S.W.2d at 623, interpreted *Gault* differently, disagreeing that a lower standard of proof could in any way benefit the youth.

> "A juvenile court, therefore, which works with juveniles at the adjudicatory stage, is at last a court; a court which sits to resolve issues under principles of due process, which is the best method yet devised for fair play . . . .
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> "The real question then is not what is best for Santana; it is whether the reasonable doubt standard in a proceeding of a felony grade which may lead to a deprivation of liberty, is a part of due process . . . .
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> "Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is in-

> nocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before *Gault* that the benefits of treatment accorded a juvenile are so helpful and beneficial to the juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self incrimination. The rights which *Gault* accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different." 444 S.W.2d at 628.

A majority of the Supreme Court of Nebraska has ruled in *Debacker v. Brainard*, 161 N.W.2d 508 (Neb. 1968), *prob. juris. noted*, 393 U.S. 1076 (1969), *appeal dismissed*, 38 U.S. Law Week 4001 (1969), that the beyond a reasonable doubt standard is constitutionally required in a juvenile court proceeding.[22] The case involved a 17 year old boy who was charged with the crime of forgery. If the youth had been charged under the general criminal laws, the penalty for the offense would have been imprisonment for between one to twenty years and a fine up to $500.[23] The four judges who felt that the beyond a reasonable doubt standard should be adopted to determine delinquency suggested that:

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[22]Under the holding of the court, four judges were of the opinion that the Act requiring proof by a preponderance of the evidence rather than beyond a reasonable doubt was unconstitutional. Since Nebraska's constitution provides that no legislative enactment may be held unconstitutional except by a concurrence of *five* judges, the lower court's finding of delinquency using the lighter standard was affirmed.

[23]*See* 44 St. John's L. Rev. 101, 109 (1969), which points out the great disparity in confinement periods between that which could result from a conviction of an adult and that which might stem from an unfavorable finding against the 12-year-old boy in the instant case. In this connection see the discussion of waiver at text accompanying notes 68-75 *infra*.

> ". . . a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged [citations omitted]. To the extent that those provisions of the Juvenile Court Act incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, we also believe they are unconstitutional and void." 161 N.W.2d at 513.[24]

While the Ohio Supreme Court has recently refused to hold that the higher standard is required by due process in juvenile proceedings, *In re Agler*, 249 N.E. 2d 808 (Ohio 1969), it did insist that delinquency be proved by "clear and convincing evidence." *Id.* at 816. The Court upset an intermediate state court's opinion which had affirmed the juvenile court's conviction of the youth based on the preponderance standard. *See* 240 N.E. 2d 874, 875 (Ohio Ct. App. 1968).[25] The Supreme Court in *Agler* refused to

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[24]This court dismissed the appeal after having noted probable jurisdiction, on the ground that, since there was no retroactive effect to be given to its decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), the juvenile "would have had no constitutional right to a trial by jury if he had been tried as an adult in a criminal proceeding" 38 U.S. Law Week at 4001.

[25]The Court of Appeals had emphasized the civil nature of juvenile proceedings. *Id.* at 876-77. *But cf. Rodello, supra,* note 21, where the Court suggested that the adoption of the higher standard would have no effect on the nature of the juvenile proceeding. The Court of Appeals in *Agler* had felt constrained to decide the case in accordance with its state's legal precedent. *See In re* Whittington, 233 N.E. 2d 333 (Ohio Ct. App. 1967). This Court remanded *Whittington* for reconsideration by the state court in light of *Gault. In re* Whittington, 391 U.S. 341 (1968). The Ohio Supreme Court had held (pre-*Gault*, post-*Kent*) that the preponderance standard was to apply because the rehabilitative (versus punitive) goals of juvenile proceedings emphasized the civil nature of such proceedings. Upon reconsideration, the Ohio Court of Appeals did not treat the quantum of proof issue. 245 N.E.2d 364 (Ohio Ct. App. 1969). The dissenting opinion in the Court of Appeal's decision in *Agler* suggested that

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accept the classification of juvenile offenders as civil defendants, and rejected the preponderance standard as being constitutionally consistent with, or adequate under, *Gault*.

The court held:

> "[T]he full protection of alleged delinquents empirically demands a broader application of any rule regarding standard of proof. As noted by the *Gault* majority (387 U.S., at 23-25, 87 S. Ct. 1428), long experience has shown that despite commendable efforts to the contrary, the suffering of a judgment of delinquency can have a lasting detrimental effect upon a child's future. This is not to say that the noble experiment has failed, but rather that one of the hopes attendant to its development has not been fully realized. For this reason, we conclude that any determination, of a proper standard of proof in delinquency hearings must

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there may well have been no precedent binding on the court. 240 N.E.2d at 879.

Prior to the Ohio Supreme Court's holding in *Agler* one recent decision seemed to suggest that Ohio might be moving towards the adoption of the higher standard. *See In re* J. R., 242 N.E.2d 604, 605-06, (Juv. Ct. Cuyahoga County, Ohio 1968):

> "Although the quantum of proof necessary for finding of delinquency, at time of the trial and at this writing, is a preponderance of the evidence [citations omitted], the court in this case had evidence in support of the petition that was beyond a reasonable doubt."

But see In re Benn, 247 N.E.2d 335 (Ohio Ct. App. 1969). In *Benn*, the intermediate state court noted that it was affirming a case which "exemplifies the fiction which allows the elision from 'crime' to 'delinquency' where a child is involved.... How long the illusion of non-criminality can be maintained under the legerdemain of a Juvenile Code status determination is a matter of some dubiety.... With deference, but reluctance, we conclude that juveniles in this state, whose status is tested on matters criminal in adults, have no right to a jury trial nor to have their condition measured by standards of proof 'beyond a reasonable doubt.' '*The condition of being a boy still spells less procedurally than the condition of being a man in otherwise identical circumstances.*" (Emphasis added.) 247 N.E.2d at 337.

respond to the aspects of both deprivation of a child's liberty and the effect upon his future. . . .

"[W]e conclude that the burden of proof in those juvenile hearings which can result in the child's being adjudged a delinquent, irrespective of disposition, need not be beyond a reasonable doubt, but must be greater than a mere preponderance of the evidence. The standard of proof which lends itself most logically to this view of such proceedings, and which will best preserve the special nature thereof, is that of clear and convincing evidence of the truth of the allegations contained in the complaint." 249 N.E. 2d at 816.

The California Supreme Court also did not follow the leadership provided by the *Urbasek* decision, nor did it even go so far as the Ohio Supreme Court in *Agler*. In *In re M*, 450 P.2d 296 (Cal. 1969), the court considered a case involving a 15-year-old boy who was charged with involuntary manslaughter and who was declared to be a ward of the court. The court (Traynor, C.J., and three other justices concurring; one justice dissenting) held that the 1961 statute adopting the preponderance standard was not "clearly, positively and unmistakably" unconstitutional, 450 P.2d at 305, and constitutional requirements did not demand that delinquency be proved beyond a reasonable doubt. As did the Court of Appeals in *Agler*, the Court felt particularly bound by its earlier decisions.

Unlike the instant case, the evidence in *M* was clear and the boy admitted that he had accidentally shot his girlfriend dead with a gun which had been taken from an automobile which he had previously stolen and abandoned.[26]

The court took a very limited view of *Gault* and indicated that the Supreme Court, in *Gault* had taken "repeated pains

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[26]Under the facts here, where the youth allegedly stole $112 from the complainant's pocketbook, the Family Court judge adopted the statutory "preponderance" standard while admitting that the proof did not satisfy the "beyond a reasonable doubt" standard. *In re* Samuel W. v. Family Court, 299 N.Y.S.2d 414, 423 (1969). *See also In re* Bigesby, 202 A.2d 785, N. 1 (D.C. Ct. App. 1964).

to limit its holding . . . ." 450 P.2d at 299. The California Court concluded that:

> " . . . in the absence of a specific ruling on the issue by the U.S. Supreme Court, we adhere to the pre-*Gault* view of our courts that the established standard is valid and 'No constitutional rights of the appellant have been infringed by the use of the preponderance of the evidence test to determine the truth of the allegation that he had committed a crime.' " *Id.* at 305

In following the *Gault* statement that the juvenile court hearing need not "conform with all of the requirements of a criminal trial or even of the usual administrative hearing" 387 U.S. at 30, the court refused to recognize the essentially criminal nature of juvenile proceeding. It offered the the euphemistic and unrealistic explanation that:

> "Although the consequences of adopting the reasonable doubt standard in juvenile court would perhaps be less drastic than adopting a jury system, to do so would nevertheless introduce a strong tone of criminality into the proceedings. The high degree of certainty required by the reasonable doubt standard is appropriate in adult criminal prosecutions, where a major goal is corrective confinement of the defendant for the protection of society. But even after *Gault*, as we have seen, juvenile proceedings retain a *sui generis* character: although certain basic rules of due process must be observed, the proceedings are nevertheless conducted for the protection and benefit of the youth in question. In such circumstances, factors other than 'moral certainty of guilt' come into play: *e.g.*, the advantages of maintaining a non-criminal atmosphere throughout the hearing, and the need for speedy and individualized rehabilitative services. Indeed, the youth's alleged crime may often be only the latest or most overt symptom of an underlying behavioral or personality disorder which could equally well warrant a declaration of wardship pursuant to other provisions of the code. Thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—

> may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interest of youth may well be served by a prompt factual decision at a level short of 'moral certainty.' " 450 P.2d at 302-03.

Judge Peters in dissent responded vigorously to the majority position. He suggested that *Gault*:

> " . . . stands for the proposition that a minor must be afforded the same rights granted a defendant in a criminal case unless there are compelling reasons why such rights should not be granted, and that state decisions and statutes providing to the contrary are violative of the United States Constitution. This fundamental lesson of the *Gault* decision is disregarded by the majority. Certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature . . . . Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation, and, as well, is contrary to the teachings of *Gault*." *Id.* at 309

In *State v. Arenas*, 453 P.2d 915 (Ore. 1969) (*en banc*), the Oregon Supreme Court also dealt with the quantum of proof issue in a case involving a 16-year-old boy who was charged with an assault with a dangerous weapon. The Court, though granting that an adult's right to be found guilty beyond a reasonable doubt when he is charged with a crime is one inherent in the Due Process Clause of the Federal and Oregon constitutions, felt particularly restricted

by the state's legislative decision to adopt the preponderance standard.

The Oregon Supreme Court noted that the requisite degree of proof "is closely related to the basic philosophy of juvenile law 'to deal with the child because he needs corrective treatment,' not because he is 'guilty' of a 'crime.' " *Id.* at 918. The court added:

> If the constitution requires that a juvenile cannot come within the jurisdiction of the court unless criminal conduct is proved beyond a reasonable doubt, the great juvenile experiment is over." *Id.* at 919.

Justice O'Connell, dissenting in *Arenas*, noted that:

> " . . . procedure designed to determine whether a child will be incarcerated is essentially criminal procedure. Since the procedure is criminal in nature there is as much reason to require the proof beyond a reasonable doubt in determining the guilt of a child as there is in determining the guilt of an adult."

He added:

> "Although the equal protection clause of the Fourteenth Amendment does not require an across-the-board similarity of criminal procedure for adults and children, that clause does require the child to have the same protection as an adult where the character of the procedure has no relationship to the ends that are served by dealing with a child in accordance with the parens patrial concept when a child is charged with the commission of an act which is a crime if committed by an adult, the question of whether the child committed the act must be resolved by the trier of fact before the trial judge takes over and attempts to apply the theories of juvenile rehabilitation. It seems to me that this preliminary question of guilt should be determined by the same test whether the accused is an adult or a child. . . . Since the relaxation of the burden of proof subjects the child to the risk of incarceration it becomes an integral part of a criminal procedure which, according to the reasoning of *Gault*, must operate to protect the child to the same extent as it would an adult." *Id.* at 921.

The District of Columbia has also refused to relax its restrictive view that a determination of delinquency is not in the nature of a criminal adjudication, and, therefore, does not constitutionally require the adoption of the higher standard of proof in juvenile proceedings. In *In re Ellis*, 253 A.2d 789 (D.C. Ct. App. 1969), the District of Columbia Court of Appeals said:

> "While we have not failed to follow the ruling of *Gault* in those cases where it clearly applies, *Gault* did not decide the question of the quantum of proof required in juvenile cases. We are therefore not persuaded at this time that we should apply the philosophy of *Gault* in order to predict what the Supreme Court might decide if faced with the same question. We are reluctant to condemn or abandon a long standing and useful practice unless the unconstitutionality of that practice is plain and manifest. *Hicks v. District of Columbia*, D.C. App. 197 A.2d 154, 155 (1964)."

> "Concededly there are points of similarity between a juvenile proceeding and a criminal trial. Nonetheless, hearings held before the Juvenile Court remain civil in nature and differ significantly from their criminal counterpart. By statute, the records of juvenile cases are not open to public inspection. Hearings are also closed to the public. Furthermore, a child adjudged delinquent is neither deemed nor treated as a criminal. No civil disabilities are imposed upon him and he is not disqualified from civil service. The purpose and rationale behind such safeguards and, indeed, the very procedure governing treatment of such juveniles is the care, needs and protection of the minor and his rehabilitation and restoration to useful citizenship. *In re Elmore*, D.C. App. 222 A.2d 255, 257, 259 (1966), *reversed and remanded on other grounds*, 127 U.S. App. D.C. 176, 382 F.2d 125 (1967). A flexible approach to juvenile proceedings is the best manner in which to achieve these ends. The safeguards which surround him do not inherently derive from the Constitution but from the social welfare philosophy which

forms the historical background of the Juvenile Court Act." 253 A.2d at 790.[27]

Another recent judicial pronouncement on the burden of proof standard in juvenile proceedings came in a decision rendered by the Fourth Circuit, *United States v. Costanzo*, 395 F.2d 441 (4th Cir. 1968).[28] Although the case dealt with federal juvenile proceedings, the court's language is noteworthy. In dealing with a 17 year old youth who had been charged with illegal interstate transportation of an automobile, the court remarked:

> "Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as criminal. We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. *See Gault*, 87 S. Ct. 1428 (1966). The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult. We see a compelling similarity between the enumerated safeguards due a juve-

[27] *See In re* Hill, 253 A.2d 791 (D.C. Ct. App. 1969); *In re* Bumphus, 254 A.2d 400 (D.C. Ct. App. 1969); *In re* Wylie, 231 A.2d 81 (D.C. Ct. App. 1967); *In re* Elmore, 222 A.2d 255 (D.C. Ct. App. 1966), *modified*, 382 F.2d 125 (D.C. Cir. 1967); *In re* Bigesby, 202 A.2d 785 (D.C. Ct. App. 1964). The Illinois Supreme Court in *Urbasek* specifically noted that the decisions in *Wylie* and *Bigesby* did not "comport with the recurrent theme of the majority in *Gault*." 232 N.E.2d at 719.

[28] Prior to the decision in *Costanzo* another federal court had before it the question of whether a proceeding under the Federal Juvenile Delinquency Act required proof of guilt beyond a reasonable doubt. *See* Paige v. United States, 394 F.2d 105 (5th Cir. 1968). The court did not decide the question, since it was of the opinion that the proof was not sufficient under either civil or criminal standards. *But* cf. United States v. Essex, 275 F.Supp. 393 (E.D. Tenn. 1967), *rev'd on other grounds*, 407 F.2d 214 (6th Cir. 1969).

> nile in as full measure as an adult and the requirement of proof beyond a reasonable doubt. In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection; and if young and old are entitled to equal treatment in the one respect, we can think of no reason for tolerating an inequality in the other."

After noting that *Jones* and *Urbasek* were in "conformity . . . with the Supreme Court's teachings' in *Gault*, the court continued:

> "For nearly two centuries this higher standard of proof required in criminal cases has been recognized as a basic procedural safeguard and has been adopted by virtually every jurisdiction in this country. *See* IX, Wigmore on Evidence §2497 (3d ed. 1940, Supp. 1964); *see also* McCormick, Evidence §321 (1954). The Supreme Court has termed the Government's obligation to prove every element of the offense beyond a reasonable doubt 'a settled standard of the criminal law.' *Holland v. United States*, 348 U.S. 121, 138 (1954).
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> "In *Brinegar v. United States*, 338 U.S. 160, 174 (1949), the Court observed that, 'Guilt in a criminal cause must be proved beyond a reasonable doubt,' and explained that requirement in *Speiser v. Randall*, 357 U.S. 513, 525-26. It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same. *Gault* makes it abundantly clear that 'under our Constitution, the condition of being a boy does not justify a kangaroo court." *In re Gault, supra*, 387 U.S. at 28.
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> "If we had to decide this case on the standard of proof issue tendered by the Government, we would be compelled to reverse, for the diluted measure proposed for juvenile cases is predicated upon a logic the cogency of which has been utterly devastated." (Emphasis added.) (Some citations omitted.) 395 F.2d at 444-45.

Perhaps no judge has more powerfully characterized the restraint imposed on the liberty of an incarcerated juvenile than Judge DeCiantis of the Rhode Island Family Court:

> "The individual liberty of a juvenile is restrained once he is committed to an agency or to the training school. He is supervised, guarded, and punished. He has no choice. He must obey the rules and the orders given to him while he is at the training school. He cannot go home at will. He cannot do what he desires. He is a prisoner just as much as the adult in the state's prison. Not only is he deprived of his liberty, but he is also subject . . . to disciplinary measures accorded to adults and can be subjected to cruel and inhuman punishment, which does exist. * * *
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> "Because the legislature dictates that a child who commits a felony shall be called a delinquent, does not change the nature of the crime. Let's face it, murder is murder; robbery is robbery; they are both criminal offenses, not civil, regardless and independent of the age of the doer. Nothing can change the nature of the act which has been committed.
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> "With respect to the argument that confinement of a delinquent is not punishment, the court would like to point out that committing a boy who has been declared a delinquent to the Training School is not trotting him to Sunday school, to a World Series Game, or his favorite swimming hole. Neither is releasing him from a Training School the same as graduating him from a high school or a junior college. Let's come down to earth and be realistic: the quicker we do, the better it will be for all. Let us not deal with a criminal matter in a civil way, with the result that we have a 'hodge podge' of nothingness.
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> "I am convinced that unless there is a separation of civil process from criminal process, the system of juvenile methods will remain congested with many theories, philosophies and inflated dreams of social-minded reforms, which is detrimental to the juvenile in that it deprives him of his constitutional guarantees and individual liberty. All of the safeguards that are afforded to an adult criminal trial should be, and constitutionally

must be applied to a juvenile case, even including that of the right to trial by a jury of his peers, *as well as a finding of guilt beyond a reasonable doubt, rather than by a preponderance of the evidence.* Then, and only then, will uniformity and due process prevail and the juvenile, the police, the court, and everyone else concerned will know where they are headed." (Emphasis added.) *In re* Rindell, 36 U.S. Law Week 2468 (R.I. Fam. Ct. Jan. 10, 1968).

2. *Legislators, Independent Committees and Commentators Have Recognized That It Is Constitutionally Impermissible to Deny A Youth His Freedom On The Basis Of The Preponderance Standard.*

Legislatures and legislative committees are, like courts, at last beginning to recognize the necessity for a criminal standard of proof in juvenile proceedings. Thus, at least four states have already adopted the reasonable doubt standard, by statute or rule.[29] Moreover, at its 1968 annual conference,[30] the National Conference of Commissioners on Uniform State Laws recommended that all states enact the Uniform Juvenile Court Act[31] which they felt reflects a sound and practical approach in light of *Gault* and *Kent*. The prefatory note to the Act states in part:

> "In both cases [*Gault* and *Kent*] the language of the opinions and the implications contained in them go beyond the specific holdings. They indicate that if the departures in juvenile court from criminal procedures are to be justified when delinquent conduct is alleged involving what for an adult would be a criminal act, the juvenile court proceedings and dispositions must be governed in fact by the objectives of treatment and

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[29] Colo. Rev. Stat. 22-3-6 (Supp. 1967); Md. Ann. Code, Art. 26 § 70-18(a) (Cum. Supp. 1969); New Jersey Court Rules, Rule 9-1(f), effective September 11, 1967; Juvenile Court Rule 4.4(b), as adopted by the Washington Judicial Council, effective January 10, 1969.

[30] Philadelphia, Pa. (July 22-August 1, 1968).

[31] Uniform Juvenile Court Act (1968).

rehabilitation. If the approach is a punitive one, these cases indicate that the procedure must adhere to the constitutional requirements which characterize a criminal proceeding.

"The Uniform Juvenile Court Act has been drawn with a view to fully meeting the mandates of these decisions. At the same time, the aim has been to preserve the basic objectives of the juvenile court system and to promote their achievement. In short, the Act provides for judicial intervention when necessary for the care of deprived children and for the treatment and rehabilitation of delinquent and unruly children, but under defined rules of law and through fair and constitutional procedure."

The Uniform Juvenile Court Act also adopts the beyond a reasonable doubt standard for findings of delinquency:[32]

"If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly, it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon."[33]

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[32]Section 2(2) of the Uniform Act defines a "delinquent act" as one "designated a crime under the law". In *Gault*, this Court specifically noted that, for purposes of the Fifth Amendment privilege against self-incrimination, juvenile delinquency proceedings which may lead to commitment to a state institution are criminal in nature. 387 U.S. at 49-50: "To hold otherwise would be to disregard substance because of the feeble enticement of the civil label-of-convenience which has been attached to juvenile proceedings."

[33]*Id.* at § 29(b). The Comment to this section asserts:

"More is required to sustain a finding of delinquency, unruly conduct or deprivation than a preponderance of evidence. Since the child's liberty or the parent's right to his custody is involved, at least 'clear and convincing evidence' should be required. The Illinois Supreme Court has recently held that implications of the *Gault* case require that proof must be beyond a reasonable doubt to support a finding of delinquency. This section follows the Illinois view in delinquency and unruly cases, but adopts the

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The recently promulgated Guides for Drafting Family and Juvenile Court Acts, adopted by the Children's Bureau of the Department of HEW's Social and Rehabilitation Service, also recommend the use of the criminal standard in determinations of delinquency.[34]

Commentators have also emphasized that a youth is denied a constitutional right when he is adjudged a delinquent by the preponderance standard.[35] Indeed, two recent

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clear and convincing evidence, rule in deprivation cases and in determining the need for treatment or rehabilitation."

Cf. Model Rules for Juv. Ct. Rule 26 (Final Draft 1968), drafted by the Council of Judges of the National Council of Crime and Delinquency which did not go so far as to adopt a reasonable doubt standard but did reject the preponderance standard:

> "While the adjudicatory hearing is non-criminal in nature, and therefore is not bound by the reasonable procedure requirement of proof beyond a reasonable doubt, the serious nature of the adjudication demands that the allegations of the petition be proved by more than a mere preponderance of the evidence. The allegations should be demonstrated by clear and convincing evidence, which is the standard used in civil cases for issues of special gravity, such as fraud." Rule 26, Comment.

It was clear that the Council felt reluctant to adopt the reasonable doubt standard only because this Court had not specifically dealt with and ruled in favor of that standard in *Whittington*. *See* Rule 26, Comment:

> "Note. The United States Supreme Court has granted *certiorari* in a case in which the failure of the juvenile court to find a child delinquent 'beyond a reasonable doubt' is assigned as error.... The publication of the Rules will be held up to incorporate the holdings in the *Whittington* case."

Whittington is discussed in note 25, *supra*.

[34] Guides for Drafting Family and Juvenile Court Acts, Dept. of Health, Education and Welfare, Social and Rehabilitation Service (Children's Bureau) § 32(c)(1969).

[35] *See, e.g.*, Waite, *How Far Can Court Procedure be Socialized Without Impairing Individual Rights*, 12 J. Crim. L., C.&P.S. 339, 344 (1921); Note, *Juvenile Courts: Applicability of Constitutional Safeguards and Rules of Evidence to Proceedings*, 41 Corn. L.Q. 147, 153 (1955); Rappeport, *Determination of Delinquency in the Juvenile*

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notes on the instant case, in favoring the adoption of the "beyond a reasonable doubt" standard, have respectively suggested that the Court of Appeals' decision had produced a "hiatus in New York's Juvenile Law"[36] and that it would "unfortunately deny the youngster accused of a crime the protections inherent within the Constitution."[37]

These court decisions, state statutes, recommendations and commentators' opinions reflect a significant body of respected authority which recognizes that both policy and the Constitution compel the adoption of the higher standard of proof in order to safeguard the fundamental rights of a youth charged with committing a delinquent act. As *Gault* so vigorously asserted:

> "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[38]

C. The Stigmatizing Effect of a Conviction In The Juvenile Court Is At Least Equal To That Which Stems From A Conviction In An Adult Criminal Proceeding.

It has always been contended that one of the most beneficial aspects of the juvenile court process was the avoidance of any classification of the youth as a "criminal." For example, in most states specific statutory language supports the benign view that a finding of delinquency is not intended to have the same stigmatizing effect as a criminal conviction:

Court. A Suggested Approach, 1958 Wash. U.L.Q. 123, 149-151; Antieau, *Constitutional Rights in Juvenile Courts*, 46 Corn. L.Q. 387, 412 (1961); 37 U. Cin. L. Rev. 851 (1968); Cohen, *The Standard of Proof in Juvenile Proceedings; Gault Beyond a Reasonable Doubt*, 68 Mich. L. Rev. ___ (1970) (article forthcoming in Jan., 1970 and available upon request).

[36] 44 St. John's L. Rev. 101, 111 (1969).

[37] 20 Syr. L. Rev. 1009, 1013 (1969).

[38] 387 U.S. at 36.

> "No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment."[39]

But over 20 years ago, the court in *Jones* noted that:

> "The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. *The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered.* The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man. Nor is the implication that he has wilfully sworn to a falsehood to prevent a conviction to be disregarded lightly. *Guilt should be proven by evidence which leaves no reasonable doubt.* Inferences must give way when in conflict with facts established by positive proof." (Emphasis added.) 38 S.E. 2d at 447.[40]

Other distinguished American jurists have not failed to comment on this fiction. Few remarks, however, have been so incisive in language or forceful in tone as that of Mr. Justice Musmanno of the Pennsylvania Supreme Court. Dissenting in *In re Holmes*, 109 A.2d 523, 528-29 (Pa. 1954) he cogently noted that the words of the majority (denying that any taint of criminality attached to a finding of delinquency):

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[39]Neb. Rev. Stat. § 43-206.03(5)(1943). *See also, e.g.*, N.J. Stat Ann. § 2A:4-39 (1952); N.Y. Family Ct. Act, §§ 782-784 (McKinney 1963); D.C. Code § 16-2308(d)(1967).

[40]*See* State v. Santana, 444 S.W.2d 614, 624 (Tex. 1969) (dissent).

> " . . . are put together so as to form beautiful language but unfortunately the charitable thought expressed therein does not square with the realities of life. To say that a graduate of a reform school is not to be 'deemed a criminal' is very praiseworthy but this placid bromide commands no authority in the fiercely competitive fields of everyday modern life."

This Court has also recently questioned whether under modern circumstances it is realistic to assert that no taint of criminality attaches to a finding of delinquency. In *Gault*, the Court asserted that it was "disconcerting" that the term "delinquent" had come to have "only slightly less stigma than the term 'criminal applied to adults'."[41]

Supportive of the stigmatizing effect which a conviction of a criminal offense carries with it is some recent data which has been compiled in the District of Columbia. This data makes it abundantly clear that institutionalized "treatment" in a juvenile detention center may have some very negative implications for the juvenile delinquent.

In the District of Columbia, the inspection and use of Juvenile Court records is by law limited to the juvenile, his parents, their duly authorized attorney, institutions or agencies having custody of the juvenile, and other "interested persons, institutions, and agencies by special order of the court;"[42] with violations punishable by a $100 fine or ninety days or both.[43] Juvenile Court rules supplement the District of Columbia Code by allowing other courts in the District of Columbia to see such records upon request.[44] In

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[41] 387 U.S. at 23-24. A noted sociologist and authority in the field of juvenile delinquency has also remarked:

> ". . . delinquency carries a stigma quite comparable to that attached to the criminal status. In many cases the adjudication and other related experiences may be a more severe psychic blow to the child than criminal conviction is to the adult." Tappan, *Crime, Justice and Correction* 392 (1960).

[42] D.C. Code § 11-1586(a)(1967)

[43] D.C. Code § 11-1586(c)(1967)

[44] D.C. Juvenile Ct. Rules, Rule 4B-2(c) (1965, as amended.)

addition, the Board of Commissioners (now Mayor-Commissioner) of the District of Columbia promulgated regulations in 1967 which make the police department's use of juvenile offender records subject to the aforegoing statutory limitations.[45] However, and in spite of the District of Columbia Code's assertion that a juvenile conviction is not a criminal conviction and does not "operate to impose any of the civil disabilities ordinarily imposed by conviction,"[46] juvenile court records (or knowledge thereof) are disclosed in various circumstances which stigmatize the youth.

There are several ways by which juvenile records become available. The most common is waiver by the juvenile himself. For example, the Juvenile Court will release a juvenile record (charges and dispositions) to the military when given a signed authorization by the person whose record is requested.[47] In other cases this waiver occurs with a prospective enlistee is asked to sign an oath concerning his juvenile and adult criminal record.[48]

Juvenile records can also be disclosed by social work agencies referring people for employment. The Offender

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[45] Revisions and Adoption of Recommendations to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (Oct. 31, 1967). *See also* D.C. Code § 4-134(a) (1967).

[46] D.C. Code § 16-2308(d) (1967).

[47] Interview with Edgar J. Silverman, Director of Social Services, D.C. Juvenile Court, November 5, 1969. Applicants for a license to drive a taxicab in the District of Columbia must list juvenile convictions on the application and sign a waiver form for the juvenile record. Interview with Officer Evans, Hack Inspection Office of the District of Columbia, November 5, 6, 1969.

[48] Interview with Sgt. Sanders, U.S. Army recruiter, November 4, 1969.

Rehabilitation Project,[49] Project Crossroads[50] and Job Corps[51] feel obligated to disclose a youth's criminal record to a prospective employer in order to place him in a job.[52] Interviews with members of these agencies indicated that such disclosure made it difficult to place people with some employers. Employment investigations may also lead to the revelation of juvenile records. Although Federal Employment Form 171 does not require a listing of offenses committed before age 18,[53] investigations for security clearances often reveal an applicant's juvenile conviction in interviews with friends, neighbors, and school authorities.[54]

The Juvenile Court as a matter of course or upon special request releases arrest and disposition information to other government agencies in the District of Columbia. A juvenile's

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[49]Interview with Miss Donna Rowles, Program Developer Offender Rehabilitation Division of the Legal Aid Agency of the District of Columbia, November 7, 1969.

[50]Interview with Mr. Daniel Little, Job Developer, Project Crossroads, District of Columbia, November 4, 7, 1969.

[51]Interview with Miss Susan Best, Job Corps, District of Columbia, November 3, 1969.

[52]Mr. John White of MATESA (Manpower Training and Employment Service Agency, formerly USES) indicated that his agency usually does not inform employers of a person's juvenile arrest or conviction record, although he considers such information in making a job placement. Interview, November 5, 1969. *See also In re* Gault, 387 U.S. at 24-25; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967): "There is evidence that many employers make improper use of [juvenile] records despite the supposed confidentiality that surrounds them."

[53]FEDERAL PERSONNEL MANUAL, ch. 731, § 2.5-2.6.

[54]Interview with Mr. James Evans, Bureau of Training, Civil Service Commission, November 5, 1969.

public school, for example, is routinely sent a record of charges and dispositions against a youth.[55] While there is no specific statutory authorization for such disclosure, it is apparently done pursuant to an "ongoing special order" of the Chief Judge of the Court.[56] Juvenile records are also disclosed to the D.C. Bail Agency, an arm of the adult court which gathers bail information. In practice, if the person does not volunteer his juvenile record, the Bail Agency gets it from the Court.[57] Furthermore, probation officers of the adult courts in the District have unhindered access to juvenile records in preparing their pre-sentence reports.[58]

The actual impact of such disclosures is difficult to measure qualitatively. It may be assumed, however, that mere identification as a juvenile offender will have some detrimental effect on the individual whose record is disclosed.[59] A potential Armed Services enlistee with a juvenile conviction must have his application reviewed by a waiver board. Presently, neither the Navy nor the Air Force will even process an application requiring waiver of an adult or juvenile conviction record,[60] while the Army bars admission to its

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[55]Silverman Interview, note 47 *supra:* Mr. Donald Bennett, Clerk of the Court of the D.C. Juvenile Court indicated that he will disclose a juvenile record to a school only if he "knows the school people and how they will use the information." Interview, October 29, 1969.

[56]If such a special order was ever put in writing, no one had a copy of it. Silverman Interview, note 47 *supra.*

[57]This material is always used in setting release conditions in the adult court. Interview with Mr. Bruce Beaudin, Director, D.C. Bail Agency, November 4, 1969.

[58]Administrative Office of the United States Courts. "The Presentence Investigative Report" Publication No. 103 Division of Probation, at 11.

[59]Rowles, Little, Best, Interviews, notes 49-51 *supra.*

[60]Interviews with Chief Petty Officer Fortier, U.S. Navy and Sgt. Miles, Air Force recruiter, November 4, 1969.

officer programs.[61] Moreover, advancement and security clearances under Civil Service often include an evaluation of a person's juvenile conviction record.[62]

Even the Hack Inspection Office considers the juvenile record in processing taxi cab license applications, though it has been asserted that a record is "not counted for too much."[63] And in the very critical field of education, the Director of Admissions of one reputable university has indicated that "parents should be entitled to know what type of children their children are attending school with" and therefore there is a question about juvenile convictions on its admissions application form.[64] The Director of Admissions also suggested that a youth "in trouble with the police" would not get a recommendation from the high school.[65]

Therefore, despite the fact that a youth is not labelled a "criminal," and despite the fact that statutes suggest that the conviction of a boy for a criminal offense will not impose any of the normal civil disabilities, these recent interviews in the District of Columbia clearly suggest that a youth is subjected to a variety of very subtle, if not direct, biases as he attempts to make his way through the adult world in an honest endeavor to live down his youthful transgressions.

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[61] Interview with Sgt.'s Hughes, and Sanders, Army Recruiting Division, Washington, D.C., November 4, 1969. *See also* Army Regulations, Rule 3-9 (1969).

[62] James Evans Interview, note 54 *supra.*

[63] Officer Evans Interview, note 47 *supra.*

[64] Interview with Mr. Brown, Director of Admissions, Howard University on November 5, 1969.

[65] *Id.*

D. The Discretionary Authority By Which A Child May Be Transferred To An Adult Court For Trial Under The Reasonable Doubt Standard Constitutes A Denial Of Equal Protection.

The matter involving Samuel Winship offers a cogent example of the disadvantage at which a juvenile is placed in relation to his adult counterpart. Samuel Winship, a youth of only 12 years of age, was charged with stealing $112 from the complainant's pocketbook. As one recent note on the instant case pointed out:

> "An adult who committed Samuel W.'s offense would have been charged with one of the following crimes: robbery in the third degree; grand larceny in the third degree; or petit larceny. The adult offender, convicted and sentenced by proof beyond a reasonable doubt, could conceivably be released after less than one year imprisonment. A teenager entitled to 'youthful offender' treatment (ages 16 to 19) would enjoy all the protections and guarantees available to the adult, including conviction only upon proof beyond a reasonable doubt and early release. Yet, because Samuel W. was only twelve years old, he was confronted with a period of incarceration ranging up to nine years. Thus, a child subject to the benevolence and safe keeping of the family court, where culpability is assessed by a 'fair preponderance of the evidence,' is actually burdened with a longer sentence than is the 'hardened criminal.' At the very least, such a disposition is illogical."[66] (Citations omitted.)

The loss of Samuel's liberty is, therefore, not an illusory fear.[67]

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[66] 44 St. John's L. Rev. 101, 109 (1969).

[67] In *Gault*, this Court required the application of a variety of procedural safeguards to a 15-year-old boy who had been charged with making lewd telephone calls. In the matter now before this Court, a much younger boy has been charged with a more serious offense that may result in a substantially longer period of detention than was involved in *Gault*.

Compounding the discrimination between adults and juveniles are laws in most jurisdictions which permit the juvenile court (or the prosecutor),[68] at its discretion, to "waive" a youth charged with committing a crime to an adult court for a full-scale criminal trial.[69] The result of such a waiver is to give the waived youth the benefit of the "reasonable doubt" standard, while the nonwaived juvenile may be found guilty on a lower quantum of proof. It should also be noted that the statutes which provide for waiver do not seem to entitle the juvenile to choose to be

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[68] *See, e.g.*, Pritchard v. Downie, 216 F.Supp. 621 (E.D. Ark. 1963), *aff'd*, 326 F.2d 323 (8th Cir. 1964); State v. Brinkley, 189 S.W.2d 314, 333 (Mo. 1945); Fugate v. Ronin, 91 N.W.2d 240 (Neb. 1958); Gerak v. State, 153 N.E. 902 (Ohio Ct. App. 1920):

> "The statutes conferring jurisdiction on the common pleas court have always included the right to try 'whoever' commits a felony, which, of course, includes minors. That court has long exercised such jurisdiction, such statutes have not been specifically amended in this particular, and there can be no question that the common pleas court still has jurisdiction to try minors, as well as adults, who commit felonies, unless the provisions of the Juvenile Court Act limit such jurisdiction. As has been said, that act does not expressly limit such jurisdiction of the common pleas court; neither does it confer such jurisdiction upon any other court."

[69] *See, e.g.*, Lyon v. Commonwealth, 131 S.E.2d 407 (Va. 1963); State v. Van Buren, 150 A.2d 649 (N.J. 1959); State v. Doyal, 286 P.2d 306 (N.M. 1955). Where few criteria for waiver are delineated in the statute, their formulation is a task residing with the juvenile court. *See, e.g.*, Kent v. United States, 383 U.S. 541, 553 (1966). Even when waiver has been accomplished, the court to which the child has been waived may be faced with the difficult task of deciding whether it should conduct the case as one of delinquency, as opposed to one under the general criminal law. *See, e.g.*, United States v. Caviness, 239 F.Supp. 545 (D.D.C. 1965). The onus is on the youth to petition the court for invocation of the delinquency procedures. *See, e.g.*, United States v. Anonymous, 176 F.Supp. 325 (D. D.C. 1959).

waived in order to benefit from the higher standard; the choice is the court's or prosecutor's alone.[70]

Consider, for example, the effect of the present waiver statute in the District of Columbia,[71] allowing the court to waive a 16-18 year old accused of a felony to the United States District Court.

Assume that a 17 year old youth is caught "red-handed" committing a robbery. Further assume that there is at least some question as to the factual issues in the case. Under a preponderance standard, conviction is assured. If proof is required beyond a reasonable doubt, the boy has a chance of being freed. The Juvenile Court judge now has the discretion to decide whether the youth shall be tried according to the higher or lower standard. This constitutes a denial of the equal protection of the laws as between juveniles tried for the same crime in the two different courts.

Nor is such a discrimination mitigated by the fact that the nonwaived juvenile faces a lower maximum penalty than

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[70] *But cf.* State v. Lindsey's Interest, 300 P.2d 491, 494 (Idaho 1956), where a 17 year old was held to have waived treatment as a juvenile delinquent by his assertion of certain constitutional rights and by his "right to be prosecuted under the criminal law."

[71] "§ 11-1553. Waiver of jurisdiction in case of felony and transfer of case. When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court by this chapter and subchapter 1 of chapter 23 of Title 16 in conducting and disposing of such cases." *See* note 15, *supra.*

the waived juvenile.[72] Juveniles may not, any more than adults, be coerced into waiving basic rights because of the fear of increased punishment if they choose to exercise them. This was the clear holding of *Nieves v. United States,* 280 F.Supp. 944 (S.D.N.Y. 1968), involving a juvenile's right to jury trial in the federal courts.

> "The alternatives presented exert strong pressure on any juvenile defendant to waive his Sixth Amendment right. Though he may well prefer to have the trier of facts be a jury of twelve, the cost of such an election is very nearly prohibitive. Such a Hobson's choice is not without parallel in other areas of criminal procedure. In recent years, it has been repeatedly held that procedural alternatives cannot be so structured so as to (1) penalize the assertion of rights guaranteed by the Bill of Rights, or (2) coerce the waiver of those

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[72] *See* Title 22 of D.C. Code (1967); D.C. Code § 24-203 (1967). It may well be that the maximum penalty for conviction in the District Court is less than the period of detention which a youth would face if he were convicted of the crime in the Juvenile Court. For example, the maximum penalty for an adult convicted of an attempted robbery in the District is a fine of $500 and/or three years imprisonment. D.C. Code § 22-2902 (1967). A 16-year-old youth who commits the same crime, however, may be detained until his majority if he is tried in the Juvenile Court. Such situations are not as uncommon as might be thought. In *Gault,* for example, the 15-year-old defendant was convicted of making lewd telephone calls and was sent to a state reformatory until such time as he reached his majority. The penalty for similar misconduct by an adult would have been a fine of $5 to $50 or imprisonment for not more than two months. Indeed, one of the reasons for concern with juvenile proceedings is that commitment can usually extend until the youth reaches the age of 21, and there are few limitations on the power of the judge to impose such a "sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 5 (1967). In the instant case a 12-year-old boy may be confined for up to nine years for stealing $112, while his conviction as an adult (under the reasonable doubt standard) might conceivably result in his release after less than one year.

rights. *See, e.g., Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); *Garrity v. New Jersey, supra; Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *United States v. Jackson,* 262 F.Supp. 716 (D. Conn.), *prob. juris. noted* 387 U.S. 929, 87 S. Ct. 2050, 18 L. Ed. 2d 989 (1967).

"These two rules are merely different statements of the following fundamental doctrine: In many cases it is constitutionally impermissible to require an individual to choose between the assertion of a right constitutionally guaranteed and the waiver of that right. Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed for choosing to assert it, any waiver may be said to have been extracted in an impermissible manner. If the individual asserts his right and thereby encounters harsher treatment than he would otherwise, such treatment may be struck down as a penalty. *But see, e.g., Nelson v. County of Los Angeles,* 362 U.S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1960); *Gardner v. Broderick,* 20 N.Y.2d 227, 282 N.Y.S.2d 487, 229 N.E.2d 184 (1967), *cert. granted,* 390 U.S. 918, 88 S. Ct. 848, 19 L. Ed. 2d 978 (1968) (No. 635); *Laboy v. New Jersey,* 266 F.Supp. 581 (D.N.J. 1967)." 280 F.Supp. at 1000-1001.[73]

This reasoning must apply equally where the juvenile is not even given the choice to begin with, but has it foisted upon him.[74] In short, a State may not set up two tracks

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[73] In *Nieves* the court also rejected the argument that the denial of a jury trial was "balanced" by other advantages of juvenile proceedings. "We doubt that erosion of a defendant's fundamental right can be sanctioned under the rubric of a balancing test." 280 F.Supp. at 1002.

[74] It is arguable that a youth charged with the commission of a crime, who could be waived for a trial to an adult court, should himself have the right to elect to be waived.

[continued]

of criminal procedures for juveniles accused of the same crime with varying degrees of proof necessary to convict and allow judges to choose between them as to individual juveniles. Such a double standard, as it pertains to so vital a matter as the burden of proof, violates the most traditional notions of Equal Protection as the *Nieves* case so

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The question of whether a juvenile should be able to elect to be tried as an adult goes to the very basis of the waiver statute itself. What is the policy of the statute?

On the one hand, it is arguable that the statute is designed to protect society. The judge is to make a determination as to whether the juvenile should be tried as an adult because his conduct is such that he should be treated as a criminal. *Cf.* People v. Yeager, 359 P.2d 261, 270 (Cal. 1961). But this raises significant issues. How can the judge decide that the juvenile should be tried as an adult because of the crime with which he is charged, unless the judge assumes that the juvenile is in fact guilty of committing the acts which he is accused of committing. *See* Green v. United States, 308 F.2d 303, 304 (D.C. Cir. 1962). Exactly what happens at a waiver proceeding is unclear. But it is dubious that the judge considers only the past conduct, independent of the pending charges, in making the waiver determination. The more likely result is that the judge examines the past conduct of the juvenile as revealed by his record and then considers the pending charges as well. *Cf. Yeager,* 359 P.2d at 270, *supra.*

But if this is the case, then the judge is deciding to treat the juvenile as an adult in society's interest. But upon being waived to the adult court, society now offers the juvenile the benefit of all the procedural protections offered criminals. The resulting situation is indeed paradoxical: in society's interest, the judge has decided that the juvenile should be treated as an adult because of his criminal nature. Yet society also offers him greater procedural protection, including the beyond a reasonable doubt burden of proof standard.

This raises the question of whether in operation the waiver statutes does in fact protect the juvenile's interest more than it operates to protect the interest of society. If the statute does so operate, then the juvenile should be able to elect to have that protection. It would appear to frustrate the statute if its operation were otherwise.

well perceived. If, on the other hand, basic due process rights are accorded juveniles in both systems, the State very well may provide for one form of disposition in the adult penal system for one juvenile defendant (based on his past record, potential for rehabilitation, etc.) and retain another in the more lenient juvenile rehabilitation system, even though they have been convicted of the same crime.[75]

II.

ADOPTION OF THE REASONABLE DOUBT STANDARD IS ESSENTIAL FOR THE PROTECTION OF A YOUTH'S PRIVILEGE AGAINST SELF-INCRIMINATION

It seems clear that the preponderance test collides with a youth's Fifth Amendment right to remain silent in delinquency proceedings—a right extended to juveniles by *Gault*. The privilege against self-incrimination, in fundamental respects, emphasizes ". . . the principle that persons accused of a crime cannot be made to convict themselves out of their own mouths." *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961).[76] That the right to remain silent is of substantial importance to the youth accused of a crime cannot be doubted. Indeed there are obvious reasons why this right is even more critical to the juvenile than to the adult, who, by virtue of his immaturity and insecurity is more likely to be confused and overwhelmed by the prospect of giving

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[75] *See* Kent v. United States, 383 U.S. 541 (1966).

[76] *See also* Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); The Fifth Amendment reflects "an unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt"; 8 Wigmore, *Evidence* § 317 (McNaughton 1961): The Fifth Amendment embodies the concept of a "fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

testimony in court than would a hardened criminal. As this Court remarked in *Wilson v. United States:*

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudice against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. 149 U.S. 60, 60 (1893)

The preponderance test is commonly understood to denote simply a relative superiority of evidence in favor of the party on whom rests the burden of proof, and on this basis it is generally held that evidence predominates when it is of "greater weight" or "more convincing" than that offered in opposition.[77] This standard of proof therefore

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[77]*See, e.g.*, Noel v. United Aircraft Corp., 219 F.Supp. 556 (D. Del. 1963) ("greater weight or more convincing"); United States v. Kansas Gas & Elec. Co., 215 F.Supp. 532, 543 (D. Kan. 1963) ("evidence when considered and compared with that opposed to it which has more convincing force and produces . . . a belief that such evidence is more likely true than not true."); Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc., 152 F.Supp. 903 (S.D.N.Y. 1957) ("more likely than not" or "more probable than not"); Christensen v. Iowa State Highway Comm'n, 110 N.W.2d 573 (Iowa 1961) ("stronger impression," "more convincing"). *See also* Delaware Coach Co. v. Savage, 81 F.Supp. 293 (D. Del. 1948) ("greater weight"); Smith v. Magnet Cove Barium Corp., 206 S.W.2d 442 (Ark. 1947) ("overbalancing in weight"); Teutrine v. Prudential Ins. Co. of America, 72 N.E.2d 444 (Ill.Ct.App. 1947) (Preponderance exists when the weight of the evidence "inclines" in favor of the party having the burden of persuasion); Edwards v. Mazor Masterpieces, Inc., 295 F.2d 547 (D.C. Cir. 1961) ("reasonable probability").

contemplates the introduction of evidence by both parties in a case.[78]

Although it seems to be recognized that the preponderance test, as applied to the civil defendant, does not require the introduction of any evidence on his behalf in order to succeed on the merits,[79] it nevertheless seems clear that this light standard of proof loses its viability without the balancing concept.

Indeed, many cases recognize that although the number of witnesses presented is not determinative of the sufficiency

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[78]The model instruction employed in the District of Columbia offers a typical illustration of the weighing concept imposed in the preponderance test:

> "Preponderance of the evidence means such evidence as, when weighed against that opposed to it has the more convincing force . . . to establish by a preponderance of the evidence is to move that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.
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> "If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party upon whom the burden of proof on that issue rested." (Standardized Jury Instructions for the District of Columbia, at 19.) (Rev. ed., published by D.C. Bar Association).

[79]*See* McCormick, *Evidence* § 319 (1954); Morgan, *Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 66 (1933). The instances in which a plaintiff introduces evidence sufficient to go to the jury and the defendant offers no evidence are virtually non-existent. Consequently, there appear to be no cases in which this situation has been judicially analyzed, with the possible exception of White v. Village of Soda Springs, 266 P. 795 (Idaho 1928). And in that case the court, in affirming a judgment for the defendant, construed the defendant's failure to introduce evidence as a demurrer—hardly a desirable posture for the juvenile who wishes to remain silent, since it requires that the evidence be viewed in the light most favorable to the plaintiff.

of the evidence, all other things being equal, (that is, given equally credible witnesses and equally plausible versions offered on either side of a disputed question) the greater number of witnesses should generally prevail over the lesser number.[80] And while it is generally understood that when the evidence is evenly balanced there is no preponderance,[81] this would also suggest that where one party offers some clear evidence and the opposing party presents none, the latter has a good chance of losing. In the case of a youth charged with a crime, the very risk of such a loss has a "chilling" effect on the exercise of a Fifth Amendment right.[82] The loss would not be merely financial, as in the case of a civil defendant—though a loss of or inability to secure employment may well result[83]—but also personal in terms of the deprivation of the youth's liberty.[84]

As we have noted in an earlier part of this brief with regard to a youth's right to the application of the reasonable doubt standard, forcing an accused delinquent to sacrifice the beneficial procedures of juvenile proceedings in order to obtain the higher standard is impermissible since the state may not impose conditions on the grant of constitutional right. Similarly, by choosing to assert his constitutional right to remain silent, the juvenile who may be

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[80] *See, e.g.*, Micheli v. Toye Bros. Yellow Cab Co., 174 So.2d 168 (La.Ct.App. 1965); Caron v. Franke, 121 F.Supp. 958 (W.D.N.Y. 1954). *See also* Williams v. Colonial Pipeline Co., 139 S.E.2d 308 (Ga. 1964).

[81] *See, e.g.*, Zurich Ins. Co. v. Oglesby, 217 F.Supp. 180 (W.D. Va. 1963); Georgia Power Co. v. Smith, 94 S.E.2d 48 (Ga. Ct. App. 1956); Greenberg v. Alter Co., 124 N.W.2d 438 (Iowa 1963).

[82] *Cf.* Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968).

[83] *See* text accompanying notes 49-54 *supra.*

[84] The reasons for using the preponderance standard in civil cases are set out in State v. Santana, 444 S.W.2d 614, 626 (Tex. 1969) (dissent).

proven guilty by evidence which demonstrates that it is "more likely" than not that he committed the offense, faces emasculation of that right. Courts have repeatedly said that this kind of Hobson's choice is impermissible. For example, in *Nieves v. United States,*[85] 280 F.Supp. 994 (S.D.N.Y. 1968), a three-judge district court dealt with a case involving a juvenile defendant who was given a choice, under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033 (1964), between being tried as an adult with a jury trial and being tried as a juvenile without a jury. The court held that the youth had a constitutional right to a jury trial and that it was not constitutionally permissible to present him with an option to waive it in favor of juvenile proceedings. The court asserted that:

> ". . . procedural alternatives cannot be so structured so as to (1) penalize the assertion of rights guaranteed by the Bill of Rights, or (2) coerce the waiver of those rights.
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> "Where a reward is held out to an individual for the waiver of a constitutional right, or a greater threat posed by choosing to assert it, any waiver may be said to have been extracted in an impermissible manner." 280 F.Supp. at 1000-1001.

In practical terms, there are probably few boys accused of a crime who, in an unwitnessed occurrence or where there are no persons available to confirm their alibi, would not feel pressured to take the stand to rebutt the evidence offered by the government. For the government's position may be far from convincing when it need only demonstrate that it is "more probable" than not that the youth committed the crime.[86] When a boy's liberty is at sake, he is,

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[85] *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

[86] "What those who have laid down the principle that 'preponderance' of evidence will justify and require a decision confirmable with it, have failed to realize, is that perception of the

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therefore, compelled to forgo a constitutional right in the hope that he will not be convicted on a meager amount of evidence which may subject him to a prolonged period of institutional atrocity and subsequent societal ostracism.

III.

ADOPTION OF THE REASONABLE DOUBT STANDARD WILL AID THE JUVENILE COURT SYSTEM IN ACHIEVING ITS LAUDATORY GOALS BY CONCENTRATING THE APPLICATION OF ITS RESOURCES ON YOUTHS WHO MOST NEED REHABILITATION.

Even if it is correct that juvenile detention provides effective rehabilitation, and even if it is true that the status of being adjudicated a delinquent does not tarnish the image of a youth, there is no basis for asserting that affording procedural safeguards to a youth will prevent a juvenile court from achieving its benevolent goals. Indeed, in specifically dealing with the dispositional stage of juvenile proceedings "by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institutuion," 387 U.S. at 13, this Court noted in *Gault*:

> "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not

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preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. It might be barely enough to convince, had it not encountered the contradictory evidence. Opposed by the latter, it may be sufficient to generate even the lowest degree of belief. To detect a preponderance of evidence . . . is neither to believe . . . nor to be logically required to believe . . . . It would be fatuous to affirm that a man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it." Trickett, *Preponderance of Evidence and Reasonable Doubt* (The Forum, Dickinson School of Law, X, 76, 1906), cited in 9 Wigmore, *Evidence* § 2498 (Supp. 1964).

> feel that he is being fairly treated and may therefore resist the rehabilitative efforts of Court personnel." *Id.* at 26.

This Court repeatedly emphasized in *Gault* that by extending certain rights to juveniles at the dispositional stage of a delinquency hearing it was in no way interfering with the "commendable principles relating to the processing and treatment of juveniles separately from adults." *Id.* at 22. The Court appropriately noted that the incentive for twentieth-century reform in legislation relating to juvenile offenders had come from men who were terribly disturbed by the adverse effects which fell upon young people who were confined to state prisons along with hardened adult criminals.[87] Guaranteeing certain safeguards to the juvenile during the hearing state of the court process would in no way prevent the effective rehabilitation of the youth subsequent to any determination of his involvement in the offense. The discretion afforded juvenile court in prescribing treatment for juveniles is left unaffected by a grant of constitutional protections. As the dissent noted in *Santana, supra:*

> "Santana is located at the same stage as was *Gault*, at the adjudicatory stage, with a felony charged, which resulted in the loss of liberty by commitment to an institution. We are not, therefore, concerned with any limitations upon care, counseling, treatment, rehabilitation, or other beneficences which he might have received and during some period of the [intake or disposition] stages. Our concern is not with juvenile philosophy generally. Our concern is whether Santana has, in fact, been judicially found to be a delinquent according to due process. He declares he is innocent of the charge of delinquency; and upon principles of justice, fairness, and equal treatment that others receive when charged

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[87] *See* Parker, *Some Historical Observations on the Juvenile Court*, 9 Crim. L.Q. 467, 476 (1967). Despite the objectives of these reforms the effectiveness of rehabilitation in juvenile institutions has been seriously questioned. *See* note 13 *supra* and accompanying text.

with rape, that he neither needs nor deserves the States' benevolence.

To hold that an act of the Legislature settles this case because it says that juvenile misconduct is a civil or a non-criminal proceeding is too easy an answer. *Gault* faced this issue squarely, and held that labels one way or the other were inconclusive. It did not jettison the juvenile philosophy of treatment and rehabilitation. It recognized that there is room for the benefits of juvenile procedures which classify as non-criminal a juvenile who is adjudged delinquent. The court expressly emphasized that a delinquency adjudication did not operate as a civil disability or disqualify him for civil service appointment. Following those statements, the court said, '*There is no reason why the application of due process requirements should interfere with such provisions.*' (Emphasis added). 444 S.W. 2d at 624.[88]

We have suggested that the adoption of the criminal standard of proof in juvenile delinquency determinations will in no way denigrate the usefulness of the post-adjudicatory rehabilitative process. Perhaps more importantly, it should be emphasized that the continued application of the preponderance standard has a detrimental effect on the quality of treatment which may be given to those convicted juveniles who really need it. We offer the District of Columbia as an example.

The District of Columbia Juvenile Court is suffering from an unprecedented increase in referrals.[89] It takes close to a

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[88]One justification often given for the application of the lower standard in juvenile proceedings is that the confinement of convicted delinquents is rehabilitative in nature, while incarceration of adult criminals is not. While rehabilitation is not given the priority it allegedly has in juvenile court, it nevertheless remains as one significant purpose and goal of the law for all convicted offenders. *See* Michael & Weschler, *Criminal Law and Its Administration* 11, 17 (1940). *See also* note 11, *supra.*

[89]6875 juvenile cases in fiscal 1969. See Annual Report of the Juvenile Court, at 21 (1969) (hereafter referred to as "Annual Report.")

year to bring a juvenile to trial, and in cases of jury trials, substantially longer. A higher standard of proof in criminal cases would affect this by increasing the number of dismissals, decreasing the number of cases originally pending, and increasing the number of pleas to reduced charges.

With the exception of intake screening, the Juvenile Court's Social Services–preparing disposition recommendations and providing supervision for probationers–come into play only after adjudication.[90] At the end of fiscal 1969, the Court's social staff of 31 persons was supervising 1442 children on probation, and preparing an additional 321 social studies for children adjudicated but not yet disposed of. The average case load per worker was 57.[91]

Referring to the rehabilitative resources available to convicted juveniles who have been committed to custody, the District of Columbia Juvenile Court's 1969 Report noted: "[O]ne of the most urgent problems confronting the Court is the limited dispositional resources available to it."[92] For example, the Juvenile Court provides totally inadequate resources for drug-addicted juveniles and for emotionally disturbed children; it has only one Youth Probation House capable of housing 15 probationers without a suitable home; and those youths committed to the Department of Public Welfare Children's Center find outdated programs and an undermanned staff.[93]

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[90] Annual Report at 7. In the Annual Report the court emphasized the need for more judges, due to a "severe backlog of cases and a serious delay in processing them." *Id.* at 17. It also cited the need for more probation workers, pointing out that the present case loads are "too high–almost double the standard case load recommended by national standard-setting agencies–to allow the necessary time to make probation a meaningful experience for the juvenile." *Id.* at 18.

[91] *Id.* at 8.

[92] *Id.* at 19.

[93] *Id.* at 19-20.

The recidivism rates of juveniles also pointed out the ineffectiveness of the rehabilitative treatment they receive. In 1966 the President's Crime Commission Report on the District of Columbia showed a 42 percent recidivism rate within six months after institutional release.[94] The court's most recent figures show that 33 percent of juvenile law offenders referred to court have already been adjudicated on a previous occasion.[95] Of the 1327 juvenile repeaters, 575 were currently on probation (43 percent), 289 under the supervision of the Department of Public Welfare following institutionalization (22 percent), and 261 (20 percent) awaiting action of the court on a prior referral.[96]

These statistics merely illustrate one jurisdiction's difficulties. They indicate that juveniles are receiving inadequate treatment as a result of meagre resources available to the courts and the community. These same resources can provide the necessary processing and rehabilitation only if the number of juveniles which must be accommodated to the system is small. It would be a far better use of these resources to limit them to youths who clearly—and by the same due process standards as adults—need them.

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[94] Report of the President's Commission on Crime in the District of Columbia 709 (1966).

[95] Annual Report at 28.

[96] *Id.* at 41.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the New York Court of Appeals, and hold that a youth convicted of a criminal offense is denied his Constitutional rights unless he is proved guilty beyond a reasonable doubt.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 778

In the Matter of

SAMUEL WINSHIP,

Appellant.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 778

In the Matter of

SAMUEL WINSHIP,

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APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinion Below

The majority and dissenting opinions of the New York Court of Appeals are reported at 24 N.Y.2d 196, 203, 247 N.E.2d 253 and appear in the printed Appendix (hereafter cited as "A. ——") at pages 38-49. No other opinions have been rendered.

Jurisdiction

The order of the Court of Appeals of the State of New York was entered on March 6, 1969. [A. 37] Notice of appeal was filed March 27, 1969 [A. 50], and probable jurisdiction was noted by the Court on October 27, 1969. [A. 52] The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1257(2).

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV

New York Family Court Act

§744. Evidence in fact-finding hearings; required quantum

(a) Only evidence that is competent, material and relevant may be admitted in a fact-finding hearing.

(b) Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroborated confession made out of court by a respondent is not sufficient.

Question Presented

DID THE FINDING OF GUILT AGAINST APPELLANT, A TWELVE-YEAR-OLD BOY FACING A SIX-YEAR CONFINEMENT FOR A LAW VIOLATION, DENY HIM DUE PROCESS AND EQUAL PROTECTION IN THAT HIS GUILT WAS PROVED, IN ACCORDANCE WITH THE STATE STATUTE, BY ONLY A MERE PREPONDERANCE OF THE EVIDENCE?

Statement of the Case

A petition charging appellant with juvenile delinquency for an alleged act of larceny was filed in the New York Family Court on March 30, 1967.[1] The petition alleged that:

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[1] A juvenile delinquent is defined by section 712 of the New York Family Court Act (hereafter referred to as FAM. CT. ACT) as "a person over seven and less than sixteen years of age who does any act, which, if done by an adult, would constitute a crime."

> On March 28, 1967, at about 6:15 p.m. [the appellant] at 2436 Grand Concourse, Bronx, . . . did wilfully and unlawfully enter the locker room of the Normandie Furniture Store . . . and did remove from the petitioner's pocketbook $112.00 . . . which he did steal and carry away. [A. 1-2]

Appellant, aged twelve, was tried at a fact-finding hearing before Judge Millard Midonick of the Family Court on March 30, 1967.[2] He was represented by the law guardian [A. 4], an attorney provided by the New York Legal Aid Society for the representation of indigent juveniles. FAM. CT. ACT, Art. 2.

The Evidence

Rae Goldman, the petitioner, a saleslady at the Normandie Furniture Store, testified that on March 28, 1967, she was at work and began her dinner break sometime before 5:30 p.m. [A. 5, 9, 10] At 5:30 p.m., upon finishing dinner which she had eaten in the store, she placed her pocketbook in one of the store's four small unlocked lockers. [A. 8, 10] She explained that the lockers are behind a door in the rear of the premises and that adjoining the lockers is a second unmarked door which opens to a lavatory for the use of store employees. [A. 7, 8]

She then resumed her duties, although no customers were present. She observed that "6 o'clock happens to be a very quiet time. It is dinner hour." [A. 7] In fact, she testified, apart from herself and two co-workers she thought there was nobody else in the premises. [A. 7, 8]

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[2] A fact-finding hearing in a delinquency proceeding is defined by the New York statute as "a hearing to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." FAM. CT. ACT, §742.

Mrs. Goldman explained that access to the store is possible only through the front entrance and that during her dinner break the entrance was visible to her at all times. [A. 8, 10] Moreover, the door behind which the lockers and lavatory are situated was in her "plain sight" from the time she placed her bag there after dinner. [A. 8] To the judge's inquiry whether she recalled any customers entering the store and walking to the rear between 5:30 and 6:15 p.m., she replied: "No. When a customer walks into the store we, as a rule, follow the customer because we try to give the customer attention." [A. 9]

At 6:15 p.m., Mrs. Goldman became aware that the lavatory door was locked. A minute or two later it opened and a boy ran out. [A. 5, 8] She saw him as he ran through the front door and into the street. [A. 7] Mrs. Goldman had no more than ten seconds to observe him as he fled. She saw his profile from a distance of twenty feet [A. 10] and claimed that the doorway through which he ran was well lit. [A. 7]

Immediately thereafter, Mrs. Goldman ran to the locker and observed that her pocketbook was not there. She then ran out to the street in pursuit of the boy. Having failed to apprehend him, she returned to the store and proceeded to the lavatory adjoining the lockers where she saw her pocketbook lying on the floor with the contents scattered. [A. 5, 6, 7] Approximately $112.00 in currency was missing. [A. 6, 7]

Mrs. Goldman telephoned the police and gave them a description of the boy by apparent age, size, skin color, and clothing. [A. 20] The following evening she was

called to the precinct where only the appellant was shown to her. [A. 6]

Mrs. Goldman further testified that she was familiar with appellant because she had seen him in the store on several previous occasions; that she had once permitted him to shine her shoes and had on other occasions chased him from the store. [A. 6, 7, 20, 21] She said that appellant was the boy who ran from the premises on the 28th of March. [A. 5, 6]

Ethel Winship, appellant's mother, testified that on the morning of March 28th she took him to the zoo and that subsequent to their return, the boy did not leave their home after 5 p.m. She testified that she was home with him and other members of the family all evening. [A. 10-11] The layout of the apartment would have precluded the boy's leaving without her seeing him. [A. 12] She was certain that her son had no money on him in the past few days other than the small change which she gave to him. [A. 12-13]

Melvin Coleman, appellant's uncle, having some doubt as to the dates of the preceding week that he had been at appellant's home, ultimately stated that on the 28th of March he was at the boy's house and that some time in the afternoon Samuel came in from play. They had dinner at about 6 p.m. and Samuel was in Mr. Coleman's sight until about 7 p.m. [A. 14-16, 25-26]

Mr. Coleman further stated that he occasionally gave appellant pocket money and that he had done so on the afternoon of the 29th; that apart from that change and small amounts obtained by shoe shining, the boy showed no signs of having large sums in the past few days. [A. 16-17]

Samuel Winship, the appellant, testified that March 28th was a school holiday and he went to the zoo in the morning with his sister and mother. Afterwards he rode bicycles with his sister. [A. 17-18] In the late afternoon his mother called him to supper. He did not leave the apartment after dinner but watched television and went to bed at about quarter to eight. [A. 18] He testified further, that he had never shined Mrs. Goldman's shoes, that he had never seen her before the night of March 29th in the police station and that he had never been inside the Normandie Furniture Store. [A. 18-19]

While on the stand, appellant said he had no money with him, and at the request of the judge, he emptied his pockets. He had only a comb and brush. [A. 19]

Patrolman Clarke testified that he arrested Samuel the night following the larceny in connection with an unrelated matter at a premises located about three and one-half blocks from the Normandie Furniture Store. When he brought the boy to the precinct, Clarke first learned of the complaint phoned in by Mrs. Goldman the previous night. She was called to the station house to identify the boy. [A. 22-24]

Clarke stated that when he arrested Samuel, the boy did not have any paper currency in his possession. He did have two rolls of dimes (not the property of Mrs. Goldman) and a shoeshine kit. [A. 23-24] Finally, Clarke estimated that the distance between the boy's home and the Normandie Furniture Store is about a fifteen minute bus ride. [A. 22]

The Finding

After both sides rested, the law guardian moved to dismiss the petition on the grounds that the allegations had not been proved by a preponderance of the evidence. [A. 25] The judge denied the motion and "found [the allegations] to be proved by a preponderance of the evidence." [A. 27] The law guardian then moved to dismiss the petition on the grounds that the allegations had not been proved beyond a reasonable doubt and the following colloquy occurred: [A. 27-28]

> Counsel: [T]his finding . . . violated the boy's equal protection rights because if he was 16, he would have to be found guilty beyond a reasonable doubt. Your Honor is making a finding by a preponderance of the evidence.
>
> Court: Well, it convinces me.
>
> Counsel: It's not beyond a reasonable doubt, your Honor.
>
> Court: That is true. . . . Our statute says a preponderance and a preponderance it is. [A. 28] . . . [A]nybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt basis and my finding isn't that certain. . . . [The finding] is not [as] certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis [sic] as an adult finding because it's not made on the same basis. . . . [A. 29]

A finding of fact was thereupon entered that appellant had committed an act which if done by an adult would constitute the crime of larceny. [A. 34]

On April 13, 1967, the petition in this case was, for purposes of record simplification, discharged to the docket of a subsequent petition. [A. 35][3] On that subsequent docket appellant was placed in the New York State Training School [A. 35] for an initial period of eighteen months, subject to extension in the discretion of the Family Court, until appellant's eighteenth birthday. [FAM. CT. ACT, §756] Placement was in fact extended by the court for one year on October 13, 1968, and expired on October 13, 1969.

The Appeal

The Appellate Division of the New York Supreme Court, First Department, affirmed the order of the Family Court without opinion on June 6, 1968. [A. 36]

The New York Court of Appeals affirmed, by a vote of four to three, in an opinion written by Judge Bergan. [A. 37] Allowing that the reasonable doubt standard may be an ingredient of due process in adult criminal trials, the majority based its holding on the denomination of juvenile proceedings as "civil." Accordingly, they found the lower standard of proof is constitutionally permissible.

Chief Judge FULD, in a dissenting opinion [A. 46] in which he was joined by Judges KEATING and BURKE, deter-

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[3] An order of discharge, in the practice of the New York Family Court, is a finding of guilt with placement (or other disposition) to be made under another pending case. Placement here was thus made pursuant to Docket D-798-67 on April 13, 1967. The extension of placement for one year was also made on that docket. In other words, the procedure followed here amounts to a consolidation of cases for the purposes of sentencing. When the judge determines an appropriate disposition for the child, for example whether he should be confined or placed on probation [see FAM. CT. ACT, §753], each and every finding of guilt which has been made against the juvenile is considered. An order of discharge is, thus, a final order from which an appeal to the Appellate Division of the New York Supreme Court may be taken as of right. [*Matter of Chauncey Reidout*, 26 A.D.2d 780 (1st Dept., 1966)]

mined that the logic of *In Re Gault*, 387 U.S. 1 (1967) requires the conclusion that the requirements of due process are not met in juvenile proceedings if a child may be found to be guilty of a law violation and incarcerated as a result, on evidence less than proof beyond a reasonable doubt.

Summary of Argument

The juvenile court judge in this case acknowledged that he had a reasonable doubt about the youngster's guilt when he determined that the boy had committed an act of larceny. Applying the standard prescribed by the New York statute, the judge expressly recognized that since culpability had been proved only by a mere preponderance of the evidence, the finding of guilt lacked certainty. Yet on the strength of that uncertain finding, the twelve-year-old juvenile faced incarceration until his eighteenth birthday.

While comparatively low standards of proof may satisfy due process where interests less critical than liberty are in issue, the very highest standard has always been employed where freedom is at stake. That highest standard, expressed as "proof beyond a reasonable doubt," is a natural corollary of the presumption of innocence. As a rule which serves to insure that no person will suffer for an act he did not commit, it is fundamental to the fairness of proceedings at which innocence is challenged. This Court has, accordingly, found that rules which serve to protect the innocent from unjust punishment acquire a due process dimension. Moreover, the unswerving adherence to the reasonable doubt standard through the history of Anglo-American law constitutes it the "law of the land" for adults who are accused of crime. In this sense

too, the standard is implicit in the concept of due process of law. *In Re Gault* accorded these "instruments of due process" to adjudications of juvenile misconduct in order to "enhance the possibility that truth will emerge" [387 U.S. 1, 19-21 (1967)] and to protect innocent children, like innocent adults, against the possibility of an erroneous conviction.

In rejecting the reasonable doubt standard for juveniles, the majority of the New York Court of Appeals refused to acknowledge the seriousness of a delinquency adjudication. It relied upon the labeling of juvenile proceedings as "civil" —a label discredited by *Gault* as a means of withholding fundamental rights from juveniles.

The decision of the court below is no firmer on its practical side. The New York Court erroneously believed that use of the high standard would deprive needy and deserving youngsters of the unique services dispensed by the Family Court. Apart from this somewhat rose-tinted view of the Family Court's offering, the fact is that the flexibility of the New York juvenile court at the pre and post fact-finding stages—the stages at which the special services of the court are operative—is in no way affected or restricted by the standard of proof by which guilt or innocence is determined. Moreover, the court's jurisdiction over juveniles in trouble who are not law violators, also serves to insure the service of the court to those who need it.

The adult-juvenile distinction, accordingly, which is drawn for purposes of flexibility at stages other than the fact-finding hearing, is unrelated to the standard of proof which governs the determination of guilt or innocence. Failure to employ the high standard for that determina-

tion is thus an unwarranted discrimination against youngsters accused of law violations and serves to deny them equal protection of the law.

ARGUMENT

POINT I

Section 744 of the New York Family Court Act, Insofar as It Permits a Finding of Guilt in a Delinquency Proceeding to Be Based Upon a Preponderance of the Evidence, Violates Due Process of Law.

When a juvenile is accused of a law violation and faces incarceration, he is entitled to every protection flowing from the presumption of innocence. The Constitution assures him of no less. This Court, in laying the cornerstone of juvenile rights, employed the force of the Due Process Clause and its basic command that a finding of guilt be preeminently reliable. *In Re Gault*, 387 U.S. 1 (1967). While *Gault* dealt specifically with rights not here in issue, the theme of that decision is unmistakable: The special interests of children may not be read to obscure the concomitant right of young offenders to be judged in a process which accords with basic notions of fairness and the protection of the innocent.

Gault determined that an excess of informality at the adjudicative stage, customary in juvenile courts, had led to grave injustices to youngsters accused of law violations. The Court documented the penal repercussions of an adjudication. It concluded therefore, that the traditional labeling of delinquency proceedings as "civil" had served only to obscure the seriousness of an adjudication and to strip the fact-finding process of the procedural regularity

appropriate to it where a loss of liberty might occur. Giving full credit to the rehabilitative goals of juvenile justice, *Gault* stressed that:

> "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" [387 U.S. at 50]

The Court deemed a delinquency proceeding based on a law violation to be "comparable in seriousness to a felony prosecution" [347 U.S. at 36]. To view delinquency proceedings otherwise, *Gault* said:

> "would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." [Id. at 50]

This Court then went on to hold that at the fact-finding stage, due process requires that delinquency proceedings observe certain time honored procedures which guard against unfairness in determining guilt or innocence. Stressing the due process mandate for a high degree of certainty where the juvenile court, despite its good intentions, may deprive a youngster of liberty, this Court wrote:

> "Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from

the confrontation of opposing versions and conflicting data." [387 U.S. at 19-21]

While this Court did not determine the standard of proof for juveniles in *Gault*, and has never squarely held which standard is constitutionally required for adult proceedings, it is apparent that of all the procedures which avoid "unfairness to individuals and inadequate or inaccurate findings of fact" perhaps the most fundamental is the requirement that culpability be proved by the highest standard of proof. That highest standard, expressed in our law as "proof beyond a reasonable doubt," is clearly designed to protect an innocent person from an unjust verdict of guilt.

The standard is indeed a natural corollary to the presumption of innocence—a presumption which is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, 156 U.S. 432, 453 (1895). The reasonable doubt standard, in turn, reflects the quality or strength of the evidence necessary to overcome that most fundamental presumption. WIGMORE, EVIDENCE, §2511 (3d ed. 1940). The right to an acquittal on a reasonable doubt and the presumption of innocence are, in fact, commonly expressed in the same statutory provision.[4]

The due process stature of the standard, elevated to that status by its role in reducing the risk of an unjust conviction, was recognized by this Court in *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958). There, Justice BRENNAN wrote:

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[4] Section 389 of the NEW YORK CODE OF CRIMINAL PROCEDURE, for example, provides that:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to acquittal."

> "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder . . . of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt."

That a rule bears the imprint of due process where its main function is to protect the innocent, has also been recognized by this Court in a recent line of decisions dealing with the retroactivity of constitutional cases.[5] In these cases, rules which safeguard the innocent were clearly distinguished from those which, by contrast, serve essentially to curb official excesses. Due process considerations arise the Court concluded, where procedures are an "adjunct to the ascertainment of truth" [*Tehan* v. *Shott*, 382 U.S. at 416] and which "affect . . . the very integrity of the fact-finding process and avert . . . the clear danger of convicting the innocent." *Johnson* v. *New Jersey*, 384 U.S. at 728.

The preponderance standard, in contrast to the reasonable doubt test, entails a much higher risk of an unjust finding of guilt. The difference between the standards could not better be illustrated than by what occurred in this juvenile's trial. The verdict of guilt against him was based entirely upon the identification made by the com-

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[5] *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967).

plainant. Yet the complainant conceded that she had but ten seconds to observe the true culprit in profile, from a distance of twenty feet, as he darted from the store. Appellant, arrested the next day, was confronted by the complainant in a "showup" in the police station. The complainant then identified him in court as the thief and as a boy she knew previously—an identification which might well have been the result of the inherently suggestive showup. See *Stovall* v. *Denno,* 388 U.S. 293 (1967).

Even crediting the complainant's identification of appellant as the boy who ran from the premises, her testimony did not establish that he was the thief. She did not see him either take or run with the proceeds. Nor was the money in appellant's possession when he was arrested the following day.

In these circumstances, the juvenile court judge in applying the statutory standard, was most forthright when he acknowledged that guilt had been established only by a mere preponderance of the evidence. Noting that he had not used a reasonable doubt test, the judge acknowledged, moreover, that his finding lacked certainty. Thus he observed:

> "[A]nybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt and my finding isn't that certain." [A. 29]

He recognized further, that the finding was not on as "solid a basis" as a verdict in an adult proceeding because of the differences in the standards of proof. [A. 29]

The suggestion by the majority of the New York Court of Appeals in this case that there is but a "tenuous difference" between the preponderance standard and proof beyond a reasonable doubt [A. 45] is thus refuted by the judge's ruling and by the facts of this case. As the dissent recognized [A. 49] the Family Court judge perceived a real and substantial difference between the standards.

Indeed, the real rather than merely semantic differences between the tests of "preponderance," "clear and convincing evidence" and "proof beyond a reasonable doubt" are reflected throughout the law. Fairly recently, this Court reiterated the substantive distinctions when it rejected the preponderance standard in deportation proceedings and required the Government to adduce "clear, unequivocal and convincing evidence." *Woodby* v. *Immigration Service,* 385 U.S. 276, 285 (1966). Justice STEWART wrote:

> "[T]o be sure, a deportation proceeding is not a criminal prosecution. [citation omitted] But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case."

The preponderance test has thus been reserved for "the general run of issues in civil cases" [MCCORMICK, EVIDENCE, §319, p. 676 (1954)]—that is, commonly, where the interests are essentially proprietary and may justifiably be affected by a mere showing of probabilities. Where the interests are more significant, for example where such issues as the legitimacy of a child, adultery, lost wills, and oral contracts to make bequests are involved, something more than a mere preponderance is required. *Woodby* v. *Immigration Service, supra,* at p. 285 and n. 18; MCCORMICK, EVIDENCE, *supra,* §§319, 320.

Where, however, freedom and good name are at stake, as they are here, history teaches that the highest certainty of proof has traditionally been required. Although the phrasing "beyond a reasonable doubt" is fairly modern, the requirement of the very highest standard of proof in criminal cases has its roots in the jurisprudence of pre-Conquest England.[6] The standard stems from the days when jurors were punished for rendering a verdict of guilt against an innocent man. IX HOLDSWORTH, HISTORY OF THE ENGLISH LAW, p. 225 (1926).[7]

The great commentators also endorsed the principle that it is better to free the guilty than to punish the innocent. IV BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, pp. 358-9, 10th ed. (1787).[8] In fact, COKE justifies the denial of counsel to a defendant in a criminal case on the grounds that the proof of guilt should be so irrefutable that counsel is unnecessary. COKE, THIRD INSTITUTES (6th ed., 1680), pp. 29, 137.

While the severity of punishment may have originally inspired the requirement of the highest measure of proof, the standard persisted as punishments became more lenient. Indeed, so deeply ingrained is this concept today in New York, that proof beyond a reasonable doubt is required for such petty infractions as violation of a zoning ordinance. *People* v. *Kollender,* 169 Misc. 995, 10 N.Y.S. 2d 252 (Nassau Cty. Ct. 1939). The standard is applied in a traffic

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[6] MCCORMICK, *supra,* §321, n. 2. The writer dates the "reasonable doubt" formulation from the year 1798.

[7] King Alfred is reputed to have hanged 44 judges in one year for having rendered "incorrect" verdicts in capital cases. GREENLEAF, EVIDENCE, §29, n. 4 (16th ed. 1890).

[8] See also, II Hale, PLEAS OF THE CROWN, p. 289 (1800); HOLDSWORTH, *supra,* at p. 224.

case [*People* v. *Martindale*, 6 Misc. 2d 85, 162 N.Y.S. 2d 806 (Montgom'y City Ct. 1957)] although the defendant does not have a right to assigned counsel. *People* v. *Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670, cert. denied, 384 U.S. 911 (1966).

The standard, moreover, has been adopted in criminal proceedings throughout this Country, IX WIGMORE, EVIDENCE, §2497 (3d ed. 1940, Supp. 1964). It is clearly a "settled standard of the criminal law." *Holland* v. *United States*, 348 U.S. 121, 138 (1954). And while the universality of a rule may not be conclusive regarding its due process stature, it does "reflect a profound judgment about the way in which law should be enforced and justice administered." See *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968).

The universal American application of the reasonable doubt standard in the prosecution of adults, reveals it as "the law of the land," the historical analogue of due process of law. In *Leland* v. *Oregon*, 343 U.S. 790 (1952) the Court held that to require a defendant to prove his insanity beyond a reasonable doubt did not reduce the Government's burden of proving all elements of the crime by the same standard. In dissent, Justice FRANKFURTER wrote:

> "It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" [343 U.S. at 802-3]

The argument presently propounded has found favor in a number of jurisdictions which, since *Gault*, have adopted

the reasonable doubt standard in their juvenile procedures. In various ways, they have thereby acknowledged that due process standards of fairness demand the highest assurance that no person, regardless of age, will suffer loss of liberty on less than the most certain proof of misconduct.

Two jurisdictions, Illinois and the United States Court of Appeals for the Fourth Circuit, have adopted the high standard for juveniles by judicial decision. *In Re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 716 (1967); *United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir. 1968). The *Costanzo* court, which deemed the reasonable doubt standard a constitutional necessity in proceedings under the Federal Juvenile Delinquency Act, declared that:

> "No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. . . . The Government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt.' . . . In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection. . . . " [395 F. 2d at 444]

A third jurisdiction, North Dakota, has adopted the reasonable doubt test by statute.[9] In New Jersey, Colorado, Maryland and Washington, the same has been accomplished by court rule.[10] An eighth state, Virginia, required the reasonable doubt criterion for juveniles some twenty years

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[9] GEN. STAT. OF N.D. ch. 27-20, §29(2) (1969).

[10] N.J. RULES, 6:9(1)f; COLO. REV. STAT. ch. 22, Art. 3, §6(1) (1967); MD. CODE ANN. Art. 26, §70-18(a) (1969); WASH. SUP. CT., Juv. Ct. Rules, §4.4(6) (1969).

before *Gault*.[11] *Jones* v. *Commonwealth*, 185 Va. 335, 38 S.E. 2d 444 (1946).

In a ninth jurisdiction, Nebraska, a majority of four of that state's highest court view the reasonable doubt standard to be constitutionally required by virtue of *Gault*. *DeBacker* v. *Brainard*, 183 Neb. 461, 161 N.W. 2d 508, appeal dism. 38 U.S.L.W. 4001 (Nov. 12, 1969). The preponderance standard still prevails in Nebraska, however, due to a state constitutional provision requiring a five-judge majority to declare a state statute unconstitutional. And in a tenth state, Ohio, the highest court has rejected the preponderance test in favor of a standard of "clear and convincing" evidence. *In Re Agler*, 19 Ohio St. 2d 70, 249 N.E. 2d 808 (1969).

Those jurisdictions which have, since *Gault*, held fast to the preponderance test have generally relied upon the now discredited " 'civil' label of convenience" to justify it.[12] No

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[11] In the years before *Gault*, most state juvenile court acts specified no standard of proof for delinquency proceedings. See, for example, IOWA CODE, ch. 232, §232-27 (1965); MINN. STAT. ANN. ch. 260, §260.155-1 (1969); UTAH CODE, Tit. 55, ch. 10, §100 (1965).

The preponderance standard was adopted by statute in California in 1961 [CAL. WELFARE AND INSTITUTIONS CODE §701]; by New York in 1962 [NEW YORK FAMILY COURT ACT, §744]; and by Illinois in 1963 [ILL. REV. STAT. 1965, pars. 701-706] although the latter was declared unconstitutional in 1967. *In Re Urbasek*, *supra*.

[12] In addition to New York, four jurisdictions which have passed upon the issue since *Gault* have retained the preponderance standard. They are Oregon [*State* v. *Arenas*, 453 P.2d 915 (1969)], California [*In Re Dennis M.*, 75 Cal. R. 1, 450 P.2d 296 (1969)], the District of Columbia, [*Matter of Ellis*, 253 A.2d 789 (App. D.C. 1969)] and Texas [*State* v. *Santana*, 444 S.W.2d 614 (1969) (Tex. Sup. Ct.)].

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adjudication subjects a child to a loss of liberty until the twentieth birthday for a girl and the eighteenth birthday for a boy, irrespective of the law violation alleged. FAM. CT. ACT, §754; §756. In many instances this may be for a much longer duration than a criminal sentence for the same act.

If the juvenile is between the ages of fifteen and sixteen and has committed a class A or B felony as defined by the New York Penal Law, that confinement may be in a penal institution under the auspices of the New York Department of Correction, rather than in a Training School run by the Department of Social Services.[13] Moreover, section 427(b) of the New York Social Services Law authorizes the transfer of any juvenile over the age of sixteen who is placed in the Training School, to a state correctional facility. The decision to transfer the juvenile is made without a hearing and is within the broad discretion of the commissioners of the departments of Correction, Social Service, and Mental Hygiene.

In addition to the loss of liberty, an adjudication, as *Gault* and the President's Crime Commission report documented so exhaustively, pursues a child for a lifetime.[14] Schools in New York are customarily privy to court records and the Armed Services generally require, as a condition of enlistment, that the applicant consent to a review of his juvenile record.

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[13] See FAMILY COURT ACT, §758(b) and NEW YORK CORRECTION LAW, §§270, 291.

[14] See *Gault*, 387 U.S. at 24; The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (hereafter referred to as *Task Force*), Lemert, *The Juvenile Court—Quest and Realities*, p. 103.

A delinquency finding may preclude subsequent civil service employment as in *Strong* v. *Kennedy*, 29 Misc. 2d 54, 210 N.Y.S. 2d 588 (Sup. Ct., N.Y. C'y 1961) where the petitioner had been automatically rejected for a job as a New York City policeman because of an adjudication fifteen years earlier, at the age of thirteen. And should an individual violate the law after the age of sixteen, his juvenile court record may be considered by the criminal courts in imposing sentence upon him. FAM. CT. ACT, §783.

It is clear, then, that the criminal-delinquency parallel drawn by *Gault* is fully apposite to New York. Acknowledging these realities, the dissent [A. 46] more accurately discerned *Gault's* intent. Chief Judge FULD determined that in light of *Gault*, a low standard of proof may not be justified on the theory that juvenile proceedings are designed, in the words of the majority, "not to punish, but to save the child." The Chief Judge concluded that where the proceedings may and did result in such substantial incarceration, culpability must be established by proof beyond a reasonable doubt.

The Chief Judge observed, moreover, that in addition to its role in augmenting the fairness of the verdict, the reasonable doubt standard is closely related to the privilege against self-incrimination. The high standard of proof, he noted, serves as a device to offset the adverse effects of an accused person's decision not to testify in his own behalf. *Gault* secured the privilege against self-incrimination to juveniles. Yet that right is severely diluted where the standard of proof is so low that a finding of guilt is virtually assured, should the juvenile elect to remain silent after only a *prima facie* case has been adduced.

Finally, the trend of authoritative commentary on the juvenile courts also favors the reasonable doubt standard. The standard has been adopted by the Children's Bureau of the Department of Health, Education, & Welfare[15] and by the National Conference of Commissioners on Uniform State Laws.[16] It has also been endorsed by the American Bar Association which, in its publication on the juvenile courts, emphasized the need for accuracy at the fact-finding stage. Its authors observed that:

> "[T]he reasonable doubt test is superior to all others in protecting against an unjust adjudication of guilt, and that is as much a concern of the juvenile court as it is of the criminal court. It is difficult to see how the distinctive objectives of the juvenile court give rise to legitimate institutional interest in finding a juvenile to have committed a violation of law on less evidence than if he were an adult." DORSEN and REZNEK, *In Re Gault and the Future of Juvenile Law*, ABA *Family Law Quarterly*, Vol. 1, No. 4, 25-27 (Dec. 1967).[17]

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[15] HEW, *Legislative Guide for Drafting Family and Juvenile Court Acts*, Children's Bureau publication no. 472, §32(c), p. 33, 1969.

[16] *Uniform Juvenile Court Act*, §29(b).

[17] The preponderance standard has been rejected in favor of the "clear and convincing" evidence standard by the President's Crime Commission [see *Task Force Report;* Lemert, *The Juvenile Court—Quest and Realities*, p. 103] and by the National Council on Crime and Delinquency. See *Model Rules for Juvenile Courts*, Rule 26, p. 57 (1969).

POINT II

The Accused Juvenile Is Denied Equal Protection of the Law When Facts Are Found By a Standard Less Rigorous Than in an Adult Trial. The Youth of the Accused Does Not Justify a Different Standard for Determining Guilt or Innocence, However It May Justify the Unique Features of the Juvenile Court at Stages Other Than the Fact-Finding Hearing.

Although *Gault* expressly premised the constitutional rights of juveniles upon the Due Process Clause of the Fourteenth Amendment, implicitly this Court invoked the child's right to Equal Protection of the law as well. By comparing a delinquency proceeding to a felony prosecution [387 U.S. at 36, 49-50] this Court placed accused juveniles in the same category as accused adults—as distinguished from other classes of persons facing serious disabilities such as deporation and civil, mental or narcotics commitment. Indeed, those jurisdictions which have adopted the reasonable doubt standard by judicial decree, have relied as much upon the Equal Protection Clause as upon Due Process. *In Re Urbasek,* 38 Ill. 2d 535, 232 N.E. 2d 716 (1967); *United States* v. *Costanzo,* 395 F. 2d 441 (4th Cir. 1968) The inescapable corollary to the single classification of juvenile and adult offenders is that to withhold a critical safeguard from some members of the class solely because of their youth is to deny them equal protection of the law. Cf. *Baxstrom* v. *Herold,* 383 U.S. 107 (1966).

Notwithstanding the single classification for adult and juvenile offenders, there are, of course, procedural differences in the way in which adult and juvenile cases are

processed. These differences, however, are wholly unrelated to the standard of proof for determining guilt or innocence. For example, in juvenile proceedings it remains desirable to retain a degree of flexibility in determining, at the pre-judicial stage, which cases should be brought before the court. Likewise, it is desirable to give the court leeway at the post-adjudicative stage—when it determines the course of treatment or rehabilitation.

But in New York, both the pre-judicial or "intake" phase and the post adjudicative or "dispositional" phase are completely separate from the hearing at which guilt or innocence of the law violation is determined—that is, from the "fact-finding" hearing. The standard of proof at the fact-finding stage thus has no effect whatever upon the unique features of the juvenile court, that is, upon the flexibility of intake services and the flexibility of the dispositional hearing.

The intake phase in New York consists of an informal conference between the juvenile, his parent, the complainant, and an "intake" probation officer. The intake officer may, and in many cases does, determine that the matter need not be brought before a judge at all. He may "adjust" the case. An "adjustment at intake" may require the juvenile to cooperate with a community agency or to report for awhile to the intake officer. If all goes well, the youngster will never be brought to court on the alleged law violation and the matter will be forgotten. FAM. CT. ACT, §734; R. 7.3.

If, on the other hand, the intake officer determines that the case should be brought to court, the statute provides that the judge at the fact-finding hearing shall have no information regarding the intake conference. FAM. CT. ACT,

§735. The desired flexibility of the pre-judicial or intake phase is thus in no way related to, let alone restricted by the standard of proof at any subsequent judicial fact-finding hearing.

The fact-finding hearing and the standard of proof which governs it are likewise insulated from the dispositional hearing. The New York proceeding, as *Gault* noted, is a bifurcated one. It is only after guilt has been established at the fact-finding stage, that a separate dispositional hearing is held. Fam. Ct. Act, §§742-746; §749. The statute, moreover, prohibits the judge when hearing a law violation, from having any information concerning the child's social or court history which may have been prepared by probation officers. Fam. Ct. Act, §756.

It is at the dispositional hearing that the unique features of the juvenile court once again come into play. At this hearing, whether there shall be confinement and if so, what type of confinement is determined. In this determination, the court is not bound by the fixed statutory commands of a penal law; rather, the welfare of the child guides the judge. Other forms of treatment short of confinement are considered as well.

For example, the child may be placed on probation or on suspended judgment. He may be sent to live with a relative, or required to cooperate with a community agency. It may even be determined that although the child is guilty of the law violation, no treatment or confinement is necessary and he may be discharged or dismissed with or without a warning from the judge. Fam. Ct. Act, §753; §§755-758; R. 7.5; R. 7.6.

At this dispositional phase, the juvenile court is appropriately informal and the procedures relaxed. The evi-

dence, unlike at the fact-finding hearing, need not be competent—only material and relevant. Compare FAM. CT. ACT, §744(a) with §745(a). The need for confinement or treatment need only be established, appropriately enough, by a preponderance of the evidence. FAM. CT. ACT, §745(b).

The fact-finding hearing, thus insulated, should appropriately resemble the procedural regularity of an adult trial. To withhold from the juvenile a critical safeguard, such as a high standard of proof, at the stage at which guilt or innocence is determined cannot be justified by the need for flexibility at the pre and post-adjudicative stages. Since the adult-juvenile distinction, relevant for purposes of such flexibility, has no relationship to the standard of proof, the disparity of standards for adults and juveniles is an unwarranted discrimination and serves to deny the latter equal protection of the law. Cf. *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

It has been suggested by the appellee that since one of the alternatives open to the judge at disposition is to dismiss or discharge the juvenile because a need for rehabilitation has not been demonstrated, the standard of proof at the fact-finding hearing is of less significance than it is at an adult trial. Such a contention rests upon the notion that a child only bears the stigma of "delinquent" if the judge determines that active treatment is indicated, whereas an adult is branded a "criminal" as soon as he is convicted.

The contention is wholly specious since a disposition of discharge or dismissal does not serve to erase the finding that the juvenile is guilty of the law violation. Realistically, such a disposition is precisely like a suspended sentence in a criminal case. The finding of guilt remains upon the record.

The discrimination against a juvenile in denying him the higher standard is underscored by the fact that youths just over the age of sixteen who are subject to criminal court jurisdiction in New York, but who are approved for "Youthful Offender" treatment, are entitled to the reasonable doubt standard of the New York Code of Criminal Procedure. The similarities between juvenile delinquency and youthful offender proceedings are striking. For example, the objective of both is to rehabilitate youngsters without subjecting them to the full consequences of a criminal conviction. Thus, both result in an "adjudication" rather than a "conviction" and the maximum penalty for both is an indeterminate confinement.[18] Since the higher standard of proof has never been considered inimical to the purposes of youthful offender proceedings, there is no cause to believe that it would undermine the goals of juvenile proceedings.

Despite the irrelevance of the standard of proof to the rehabilitative purposes of the Family Court, the New York Court of Appeals in this case observed that the event which brought the child to court and which is the subject of the fact-finding hearing may only play a small role in "the totality of factors which cause a child to meet difficulty in his life." [A. 40] In other words, the majority suggested that even if the child were innocent of the particular law violation, he might still require the services of the Family Court.

This concern that a child, though innocent of a law violation, might be engaging in a general course of conduct inimical to his welfare which calls for judicial inter-

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[18] Compare the NEW YORK FAMILY COURT ACT, §§756, 758, 781-784 with NEW YORK CODE OF CRIMINAL PROCEDURE, §913-f, j, k, n, q.

vention is met, however, by other provisions of the New York statute. Section 713 of the Family Court Act gives the Family Court jurisdiction over "Persons In Need of Supervision." Such a person is defined as:

> "A male less than sixteen years of age and a female less than eighteen years of age who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." FAM. CT. ACT, §712(b).

In other words, to require a dismissal or acquittal of a law violation because guilt has not been proved beyond a reasonable doubt, does not prevent the court from rendering service to youngsters who need it. Where an interested person has knowledge of the youngster's wayward behavior he may file a Person In Need of Supervision petition. FAM. CT. ACT, §733.

In sum, the durable and universal standard of proof regarded as the minimum upon which an adult may suffer loss of liberty, is no less appropriate for juveniles. Its rejection by the New York Court in juvenile proceedings rests upon the inaccurate assumption that a high standard of proof will interfere with the help which juvenile courts may uniquely be able to render to children. Incarceration of a juvenile, New York has said, does not require the care or certainty that is required for the incarceration of an adult. Even assuming the popular premise that incarceration of a youngster for rehabilitation is a benevolence, it is well to heed the wisdom of Justice BRANDEIS who observed that:

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead* v. *United States,* 227 U.S. 438, 479 (1929, dissenting opinion)

Conclusion

WHEREFORE, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

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(39634)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

In the Matter of SAMUEL WINSHIP, *Appellant*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

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In the Matter of SAMUEL WINSHIP, *Appellant*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

Question Presented for Review

The question presented, as stated by appellant, is essentially accurate.[1] This question raises, we suggest, the following possible basic constitutional issues:

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[1] The statement that the boy was "facing a six-year confinement," however, tends to distort the actual situation. The New York Family Court Act, §758(c), provides that no commitment may exceed three years. Under the Rules of the Family Court, Rule 7.7, a commitment shall be for an indefinite term not exceeding three years.

The docket for this proceeding (File No. 797) shows that the matter was discharged to File No. 798. On April 13, 1967, appellant was placed in a training school. The file reveals that he was placed on "parole" [evidently meaning probation] on February 20, 1968, and that, after living with his parents, he "absconded" on August 2, 1968. Apparently he was found thereafter and, on October 7, 1968, the docket shows that the commitment was extended for one year as of October 13, 1968. The docket does not reveal any other extensions of the commitment.

1. Does any involuntary confinement imposed by a state require the availability of all the protections available to a defendant in a criminal proceeding?

2. If the answer is in the negative, must all such protections, nevertheless, be made available in New York juvenile proceedings on the basis of a conclusion that they are actually criminal trials?

The first issue would appear to relate only to due process. The second is a basic issue with respect to both the due process and the equal protection arguments advanced by the appellant.

Statement of the Case

Because we believe that the appellant's recital of the facts is in some respects inadequate, we shall restate them.

Petitioner's Case

Rae Goldman, the petitioner in the Family Court, testified that she is a sales person in a furniture store at 2436 Grand Concourse in the Bronx (4-5, 6).[2] On March 28, 1967, at 6:15 p.m., a co-worker informed her that the door to the bathroom was locked (5). They waited to see who would come out (5). After a minute or two, the appellant ran out (5). Mrs. Goldman ran to the locker room, which adjoins the bathroom (5). Her bag, which she had placed in an unlocked locker in the room at 5:30 p.m., was gone (5, 8, 10). It was found on the bathroom floor, its contents scattered (6). Missing from the bag was petitioner's money, $112 (6).

No customers had been in the store during the 45-minute period between the time she placed the bag in her

[2] Unless otherwise noted, references are to the Appendix.

locker and the time the boy ran out (7, 9). The only people in the store were two girls who were co-workers (7). The only access to the store was from the front (8). She did not see the boy come into the store (8, 10).

Mrs. Goldman saw the boy run out of the bathroom and out into the street (5, 7). It was still daylight and the door was well lit (7). As he quickly ran the twenty feet from the bathroom to the doorway, she saw him for about ten seconds, including the profile of his face (10). She observed that he was wearing a coat with a fur collar, a cap and his glasses (10).

On at least six prior occasions she had seen this little boy, "a number of times sneaking around and prowling around the store," and she had threatened to call a policeman to get him out (6, 7, 20). He always had a little shoe box with him, and he had once shined her shoes in the store (7). When she was asked whether it was possible that she had made a mistake in identification, she replied (21):

> "No. I know the scar on his face. I know that little boy. I couldn't miss him any place."

When Mrs. Goldman found that the money was missing, she called the police station and described the boy (20). At the trial she recalled having described him as a little boy between 12 and 14 years of age, "under five feet five, round face, dark coloring and wearing glasses and I described his clothes" (20). [A police officer recalled the description given by her, as entered on the police report, as including glasses, a leather cap, fur collar and that the child was under five feet (21).] Actually, the boy was 12½ years old and about four feet, nine inches tall (9).

On the night after the incident Mrs. Goldman was called by the police and told that they had picked up a

boy who answered her description (20). She went to the police station and identified him (6).

Patrolman *Clarke,* whose testimony concerning the description has already been described, testified that at about 8:40 p.m. on March 29, 1967, he found the appellant trespassing in the rear of a bakery on East Fordham Road, about three and a half blocks from the furniture store where Mrs. Goldman works (22, 24). The boy had a shoe shine kit (23). He had two rolls of dimes, totaling $10, in his pocket, but this was not money taken from Mrs. Goldman (23-24). When the boy was picked up, it was not because of the description given by Mrs. Goldman (22). The patrolman also testified that the residence of the appellant was about a 15 minute bus ride from the furniture store (22).

Appellant's Case

Ethel Winship, appellant's mother, testified that, after returning from a morning trip to the zoo, her son left the house at about 3:00 or 4:00 o'clock on March 28, 1967, to go bicycle riding with his sister (11). He returned a little after 5:00 p.m., and they had dinner at 6:00 p.m. (11). In the evening he watched television with his father (11). At no time did he leave the house after returning from bicycle riding (11). It was impossible for him to leave the house without being seen (12).

The witness acknowledged that appellant did shine shoes (13).

Melvin Coleman, Mrs. Winship's brother, testified that he was in his sister's house on March 28, 1967, and did not leave it all day (15). He said that the appellant returned to the house from bicycle riding at 3:30 p.m. and that they had dinner at 6 p.m. (15, 16). When he was asked what

day of the week he was talking about, he first said he did not remember and then said he thought it was a Wednesday (15). Only after he was informed that it was a Tuesday did he testify that the day the boy went to the zoo was a Tuesday (15-16).

He said that he had eaten dinner at his sister's house together with Samuel every day of the week involved (16), but, after the policeman testified that the boy had been apprehended on Wednesday evening, he recalled that he had not eaten there on Wednesday (26). [It should be noted that this testimony was being given on Thursday of the same week.]

Samuel Winship, the appellant, testified that he went to the zoo with his mother and sister on March 28th (17). Afterwards he went bicycle riding with his sister until his mother called him upstairs to get ready to eat (17-18). It was still daytime (18). After dinner he watched TV (18). He went to sleep at about a quarter to 8 (18).

Appellant denied that he had ever shined Mrs. Goldman's shoes or seen her before she came to the police station (18, 19). He also insisted that he did not know the store and had never been in it (18, 19). He acknowledged that he wore a leather cap (13).

Decision of the Family Court

Following the conclusion of the case, the Court orally analyzed the testimony. The judge stated that the issue came down to a question of credibility (26). He noted the boy's obvious self interest and remarked that a mother and uncle might lie in an attempt to establish an alibi for a boy they loved (26-27). He saw no reason why Mrs. Goldman should lie or seek to punish an innocent boy (27). He said that he thought that Mrs. Goldman knew the boy very well,

pointing out that she knew about his shoe shining activity and about his hat (27).

After the Law Guardian added to her other arguments one about the $112 not having been found, he made his finding, as follows (27):

> "After both sides rest, the petition is found to be proved by a preponderance of the evidence. The testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well. That is a finding. If I'm wrong, I'm wrong."

The Law Guardian then argued that the finding violated the boy's equal protection rights because, if he were 16, he would have to be found guilty beyond a reasonable doubt (27). She pointed out that the judge was making a finding on the preponderance of the evidence, and he replied (28): "Well, it convinces me." When she said that it was not beyond a reasonable doubt, the judge said (28):

> "That is true. I'm convinced of the facts alleged. Our statute says a preponderance and a preponderance it is. That is the only difference between children and grownups that I can see. I don't think it's an unfair difference at all."

Later, in the course of a general discussion of the validity of the quantum proof distinction, there was the following colloquy (29):

> "Mrs. Rosenberg: No finding is certain.
>
> The Court: No, not certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis as an adult finding because it's not made on the same basis, but then there are hundreds of ordinary Civil Court Judg-

ments for money and sometimes for huge amounts made on the preponderance of the evidence by juries and judges alike and injunctions are made and divorces are given. Adultery is found on the basis of preponderance. This boy's life won't be hurt by my finding. The question is if it's true.

Mrs. Rosenberg: He may be hurt.

The Court: Yes.

Mrs. Rosenberg: He's subject to training school for this finding.

The Court: Well, it would have to be a lot more than this finding before he ever gets taken away from his mother. Let's have the probation report. I must say or get on that your argument is very, very well put, but it does not prevail today."

Summary of Argument

The issue of whether due process is denied by a juvenile delinquency proceeding in which the decision with regard to the commission of the wrongful act is based on the preponderance of the evidence was not decided by this Court in *Matter of Gault*, 387 U.S. 1 (1967). To hold that the proof beyond a reasonable doubt standard must be used would appear to require either a conclusion that the New York juvenile proceedings are essentially equivalent to a criminal trial or that any proceeding which may lead to a person being confined must be decided on the basis of such a standard of proof.

The New York juvenile proceedings are far different from ordinary criminal proceedings. While no juvenile court has come close to achieving the aims of those who originated such courts, the New York court is one of the best of such courts. Its procedures comply with normal

due process requirements and include most, if not all, of what are generally regarded as desirable features. It has been continually studied and upgraded.

A determination that the New York law unconstitutionally denies due process because it does not provide for use of the reasonable doubt standard probably would not have a serious impact if all that resulted would be a change in the quantum of proof. A determination on the ground of equivalency to criminal trials, however, might almost automatically require the use of juries. This would substantially alter the nature of juvenile proceedings in an undesirable manner. It would greatly reduce their present secrecy. Such a determination might also require similar changes in "persons in need of supervision" proceedings.

A ruling that in any proceeding which may result in a person losing his liberty the use of the reasonable doubt standard is required would be far ranging in its effect. In addition to juvenile delinquency proceedings, it might be applicable to "persons in need of supervision" and to neglected children since, under certain circumstances, they may be compulsorily removed from the home of their parents. It would also affect proceedings to commit insane persons, chronic alcoholics, sexual psychopaths and narcotic addicts. In addition, it apparently would apply to civil contempt proceedings.

It is not a denial of equal protection of the laws to have a standard of proof for juvenile delinquency proceedings different from that for adult criminal trials or "youthful offender" criminal trials. There are many rational bases for the distinction.

POINT I

The inclusion in the New York Family Court Act of a provision that the determination at the conclusion of a fact-finding hearing in a juvenile delinquency proceeding must be based on a preponderance of the evidence does not constitute a denial of due process of law.

a. The *Gault* and *Kent* cases.

(1)

In view of the appellant's great reliance on *Matter of Gault*, 387 U.S. 1 (1967), it seems appropriate first to review exactly what was decided in that case. The nature of the *Gault* case was aptly and succinctly stated by Judge Bergan in his opinion for the majority in the present case. He said (43):

> "In *Gault* there was an absence of elemental fairness. The complainant was not sworn and did not appear in court; there was no adequate notice of the proceedings given to the parents; there was no counsel or offer of counsel; no record was made of proceedings; there was no right of appeal or review; and the juvenile court Judge, explaining his action, seemed to have a somewhat vague notion of the alternative open to him (387 U.S. 1, 28-29)."

Analysis of the lengthy and thoughtful majority opinion of this Court in *Gault* makes one thing clear. Great care was taken not to prejudge issues which were not deemed vital to the decision being made.[3]

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[3] Mr. Justice White and Mr. Justice Harlan, however, concluded that some of the issues decided were not essential to the determination (pp. 64-65, 72-73).

The Court deliberately refused to consider the issue raised by the present case—the quantum of proof—although that issue had been considered by the Arizona Supreme Court. Justice Fortas said (pp. 10-11):

> "We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution."

Although the opinion discusses actual and claimed deficiencies in the juvenile delinquency process and notes the extent to which it resembles a criminal case, it appears to have been written with a planned effort to avoid a conclusion that either the resemblances to a criminal case or the fact that children are deprived of their liberty requires that a child involved in a juvenile delinquency proceeding must be provided with all the rights and protections accorded to an adult in a criminal case.

Certain essential ingredients of due process, it was held, must be afforded the juvenile. These include the right to adequate notice of the charges, counsel, confrontation and cross-examination and the privilege against self-incrimination. Immediately before his discussion of these specifications, Mr. Justice Fortas referred to *Kent* v. *United States*, 383 U.S. 541 (1966), and quoted the following sentence from page 562 of that opinion (387 U.S. at p. 30):

> "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

In the next sentence of the *Gault* opinion he stated that this view was being reiterated.

Elsewhere in the opinion emphasis was placed on due process requirements applicable to both civil and criminal proceedings. Thus, in dealing with the question of notice, it was said (p. 33):

> "Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding."

With respect to self-incrimination, it was emphasized that the privilege may be claimed in a civil or administrative proceeding if the statement is or may be inculpatory (p. 49). It is then that the opinion made the only statement, as far as we can find, that treats a juvenile delinquency proceeding as though it were criminal in nature. It states that juvenile proceedings to determine "delinquency" which may lead to a commitment in a state institution must be regarded as "criminal" for purposes of self-incrimination (p. 49). It notes that in more than half of the states a juvenile may be placed or transferred to adult penal institutions.

Even this narrowly limited statement with regard to self-incrimination was not essential to the decision of this Court. This can be seen from the next paragraph of the opinion. There it is pointed out that in Arizona, as in most states, provision is made for juvenile courts to relinquish or waive jurisdiction to the ordinary criminal courts. Obviously, this ground alone could have been sufficient basis for deciding that the privilege against self-incrimination was applicable. [We call attention to the fact that in New York, unlike Arizona and many other states, there is no such provision for relinquishment or waiver to the criminal courts.]

(2)

Although *Kent* v. *United States,* 383 U.S. 541 (1966), was decided on grounds of statutory construction, the opinion has constitutional overtones. It held that a waiver of jurisdiction by the juvenile court so that the case could be tried in a criminal court is a matter of such importance that it must be preceded by a hearing. In such a proceeding, it was decided, the child is entitled to counsel and, through counsel, access to the social records and probation or similar reports which may be considered by the court in making its decision on waiver. He is also entitled to a statement of reasons for the juvenile court's decision.

We have already quoted the statement, reiterated in *Gault,* to the effect that the hearing need not conform with all requirements of a criminal trial or even of the usual administrative hearing, but that it must meet the essentials of due process and fair treatment (*ante,* p. 10). This Court also stated (383 U.S. at p. 556):

> "This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guarantees which would be applicable to adults charged with serious offenses must be applied in juvenile proceedings concerned with allegations of law violation."

(3)

Our view concerning the nature of *Gault* and *Kent* is in accord with that of most of the state courts which have dealt with the issue of quantum of evidence or related issues subsequent to the decisions in those cases. *In re M,* 70 Cal. 2d ——, 75 Cal. Rptr. 1, 450 P. 2d 296 (1969); *State* v. *Santana,* —— Tex. ——, 444 S.W. 2d 614 (1969); *In re Wylie,* 231 A. 2d 81 (D.C. App., 1967); *In re Ellis,* 253 A. 2d 789 (D.C. App., 1969); *State* v. *Arenas,* —— Ore.

—, 453 P. 2d 915 (1969). *Cf. In re Agler,* 19 Ohio St. 2d 70, 249 N.E. 2d 808 (1969) (where the Court held that "clear and convincing evidence" was required); *In re Burrus,* — N.C. —, 169 S.E. 2d 879 (1969); *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 234 A. 2d 9 (1967) (holding that *Kent* and *Gault* do not require a state to afford a juvenile full criminal due process). We call particular attention to the well reasoned opinions by the California and the Texas courts.

In re Urbasek, 38 Ill. 2d 535, 232 N.E. 2d 716 (1968), held, upon the basis of the recurrent theme of the majority opinion in *Gault* (232 N.E. 2d at p. 719), that proof beyond a reasonable doubt is constitutionally required. And *United States* v. *Costanzo,* 395 F. 2d 441, 443-445 (4th Cir. 1968), has reasoned dictum to the same effect. In *De Backer* v. *Brainard,* 183 Neb. 461, 161 N.W. 2d 508 (1968), app. dism. 38 U.S. Law Week 4001 (Nov. 12, 1969), four of the seven judges would have followed *Urbasek* and required proof beyond a reasonable doubt, but the Nebraska constitution bars a declaration that a statute is unconstitutional except by the concurrence of five judges. Cf. *Nieves* v. *United States,* 280 F. Supp. 994 (S.D.N.Y., 1968).

The writers of articles in law reviews and sociological journals are divided on this question. It should be noted that some of them, in supporting the view that a reasonable doubt standard should be required, fail to draw the distinction between constitutional compulsion of the use of such a standard and the mere desirability of such a legislative mandate.

At this point it is appropriate to deal with appellant's statement that the trend of authoritative commentary favors the reasonable doubt standard (App. Br., p. 24). The Children's Bureau's *Legislative Guide for Drafting*

Family and Juvenile Court Acts (1969) and the *Uniform Juvenile Court Act* prepared by the National Conference of Commissioners on Uniform State Laws, which it follows, are both suggestions for legislation. The statement that the American Bar Association has endorsed the reasonable doubt standard appears to be erroneous. It seems to be based on the publication of an article written by two authors in the ABA Family Law Quarterly. That periodical contains a disclaimer note in each issue, reading as follows:

> "The material contained herein represents the opinion of the authors, and shall not be construed to be the action of the American Bar Association or the Section of Family Law unless adopted pursuant to the By-Laws of the Association and the Section."

There is no suggestion by appellant that the article has been so adopted.

The *Model Rules for Juvenile Courts* (1969) prepared by the Council of Judges of the National Council on Crime and Delinquency propose a "clear and convincing" evidence standard. It is plain that this is a legislative proposal and not a conclusion based on constitutional law, as can be seen from the commentary on Rule 26 (p. 57).

A similar suggestion contained in a task force report of the President's Commission on Law Enforcement and Administration of Justice is not, despite appellant's statement to the contrary, the view of the President's Commission or of the task force. This suggestion is contained in a paper prepared by Professor Lemart and published as Appendix D of the *Task Force Report: Juvenile Delinquency and Youth Crime*,[4] pp. 91, 103. The foreword to

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[4] Hereafter cited as "Task Force Report."

this task force report clearly states the appendices are merely papers submitted to the Commission by consultants.

Indeed, the Task Force Report concluded (at p. 40) that: "Some elements of the criminal trial, including jury trial, a standard of proof beyond a reasonable doubt, a wholly open and public trial, and a rigid insistence on the privilege against self-incrimination in all its aspects, are not here regarded as so essential to procedural justice as to warrant the risks their use would entail for the integrity of the juvenile court."

b. The basic issue.

Broadly stated, the basic issue is whether due process requires that the conduct upon which a determination of juvenile delinquency rests must be proved beyond a reasonable doubt. The issue may, perhaps, be narrowed to hinge the determination on the nature of a particular state's juvenile proceeding and its treatment of juvenile delinquents.

Ordinarily, of course, due process does not call for proof beyond a reasonable doubt. Normally such a quantum of proof is required only in criminal trials or in proceedings which are criminal in nature. While, as we shall show later, it has never been squarely held by this Court that due process compels such a measure of proof in criminal cases, we shall assume that it does in making almost all of our argument.

There would appear to be only two bases on which it could be held that proof beyond a reasonable doubt is essential in a juvenile proceeding. One is that such proceedings in all instances or, by reason of their nature, in in some states so closely resemble a criminal proceeding that it is improper for a state to treat them as different

from a trial of an adult for the commission of a crime. (The argument advanced by the appellant that it is a denial of equal protection to apply a standard of proof to juveniles different from that afforded to adults or older adolescents is merely the due process argument in equal protection trappings.) The only other basis we can conceive of for requiring the reasonable doubt standard is a conclusion that such a measure of proof is a due process requirement in any legal proceeding which may lead to a loss of liberty.

We do not believe that the Constitution imposes such a requirement on either ground. It may be concluded that it would be desirable to have such a standard of proof in delinquency proceeding, but that should be decided by the legislatures. This Court, of course, will reject the assumption of some writers on this subject that whatever is desirable is automatically a constitutional requirement.

c. New York juvenile proceedings are not criminal proceedings.

(1)

We shall not attempt to review the aims and aspirations of the juvenile court or its history. That has been adequately described by Mr. Justice Fortas in *Kent* and *Gault* and by the numerous articles cited in those opinions. There seems little doubt that, if the court had fulfilled the dreams and hopes of its innovators, the issue presently before the Court would not have been regarded seriously. If the juvenile court in its ideal form were merely a disguised criminal court, it would be incredible that the courts of forty states would have upheld its constitutionality. Paulsen, *Kent* v. *United States*: *The Constitutional Context of Juvenile Cases,* 1966 Supreme Court Review 167, 174-175. See, also, *Pee* v. *United States,* 274 F. 2d 556, 561 *et seq.* (D.C. Cir., 1959).

The critical question appears to be, as aptly stated in *Kent*, "whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults" (383 U.S. at p. 555). It is tragic that so noble an experiment has thus far fallen so short of its goal. Despite universal adoption of the juvenile court in this country, it cannot reasonably be claimed that it has met its goals in even a single state. Yet few, if any, of its critics are ready to suggest that it has failed to the point that it should be abandoned. See the report of the President's Commission on Law Enforcement and Justice, *The Challenge of Crime in a Free Society* (1967), p. 81.

Those who have studied the court offer varied reasons for its limited success aside from inadequate knowledge of the cause of and the cure for what is generally regarded as wrongful conduct. Some, such as the inadequacy of funds given the court, the caliber of some of the juvenile court judges and the deficiencies of treatment and of places of confinement, apply to New York, but to a lesser degree than in most states. Others, such as the setting up of a court which is a criminal court except in name and procedures and the failure to attempt to make reforms as time and experience reveal their need, cannot, we submit, be ascribed to New York.

Since the inception of the juvenile court in New York, it has been repeatedly studied and, as a result, its nature and procedures have been revised from time to time. Only a little more than seven years ago, as a result of a comprehensive study, substantial changes were made (N.Y. Laws 1962, chs. 686-691). Subsequently a number of other changes were adopted, as can be seen in the pocket part

of McKinney's Consolidated Laws of New York, Book 29-A, Part 1, Judiciary—Court Acts, Family Court. Earlier this year more Family Court judges were provided. See *N.Y. Judicial Conference—14th Annual Report* (1969), p. 244.

Despite these efforts much remains to be done. We suggest, however, that, in light of the nature of the court in New York, its procedures and the manner in which those who are found to be juvenile delinquents are subsequently dealt with, it cannot reasonably be held that performance in New York has fallen so short of the theoretical purpose of the court as to require that it be treated as a criminal court so as to make applicable all of the constitutional guarantees available to adults.

(2)

Unless it is held that due process requires proof beyond a reasonable doubt in every proceeding which may result in an individual losing his liberty, it would seem that the issue is not a generalized one. It is the specific one of whether the quantum of proof standard of the New York law unconstitutionally deprives children found to be juvenile delinquents under it of due process. The question is not whether another juvenile court's procedure or the procedures of most of the states' juvenile courts violate due process. It is whether the juvenile court in New York, its procedures and its operation are such that, despite its label, it is in effect a criminal court.

We need not remind this Court that those who attack the constitutionality of a statute must bear the burden of overcoming the presumption of constitutionality. That burden is not met by showing flaws in juvenile courts of other

states; nor is it met by citing articles or governmental studies which recite deficiencies of juvenile courts without specifying whether such criticism applies to the New York courts.

The New York court has probation and auxiliary services (Family Court Act, §§ 252, 253). In proceedings to determine juvenile delinquency or whether a child is a person in need of supervision or is a neglected child, the minor has a right to counsel of his own choosing or of a governmentally paid law guardian (Family Court Act, §§ 241-249). In the 1967-68 period there was such legal representation in 98% of the proceedings in New York City and in 51% elsewhere in the state (*N.Y. Judicial Conference-14th Annual Report*, p. 274). There is an intake service which attempts to adjust, among others, juvenile cases without formal judicial proceedings (*id.*, p. 272; Family Court Act, § 734).

The governing statute requires the giving of adequate notice of the charges (Family Court Act, §§ 736, 737). The child and his parent must be notified of the right to remain silent and to be represented by his own counsel or a law guardian (*id.*, §§ 728, 741). Statements made during a preliminary conference are not admissible at a fact-finding hearing (*id.*, § 735).

While the statute does not expressly require confrontation or confer the right of cross-examination, it has consistently been treated as conferring these rights. At the fact-finding hearing to determine whether the juvenile did the acts alleged in the petition, the only evidence admissible is that which is "competent, material and relevant" (*id.*, §§ 742, 744). For the purpose of determining whether the child did such acts, an uncorroborated confession made out of court by him is not sufficient (*id.*, § 744). When an order

is made finding that a child is a juvenile delinquent, the court must state the grounds for the finding (*id.*, § 752).

Provision is made for an unusually speedy hearing. Before the petition is filed no child may be detained more than forty-eight hours without a hearing to make a preliminary determination of whether the court appears to have jurisdiction and, if so, whether the child should be detained (*id.*, § 729). He is detained only if there is a substantial probability that he will not appear in court or if there is a serious risk that he may, before the return date, do an act which if committed by an adult would be a crime (*id.*, § 728). If he is detained, the fact-finding hearing must commence not more than three days after the petition is filed (*id.*, § 747). Unless on request by the juvenile, the hearing may not be adjourned for more than three days except when the petition alleges a homicide or an assault on a person incapacitated from attending court as a result thereof, in which instances the court may adjourn the hearing for a reasonable length of time (*id.*, § 748). On request by the juvenile or his representative for good cause, the hearing may be adjourned for a reasonable period of time (*ibid*). Successive motions to adjourn may be granted only in special circumstances (*ibid*).

The dispositional hearing, to determine whether the juvenile requires supervision, treatment or confinement, is separate from the fact-finding hearing (*id.*, § 743). It may commence immediately after the fact-finding hearing unless adjourned; and adjournments, if the child is detained, may not exceed two ten day adjournments (*id.*, §§ 746, 749). Only material and relevant evidence may be admitted (*id.*, § 745). Reports of the probation service for use in making an order of disposition are not furnished to the court prior to the completion of the fact-finding hearing; the reports are deemed confidential, but the court may disclose them,

in whole or in part, to "the law guardian, counsel, party in interest or other appropriate person" [*id.*, § 746(b)].

An adjudication at the conclusion of a dispositional hearing must be based on a preponderance of evidence [*id.*, § 745(b)]. Even after an adverse fact-finding determination, the proceeding may be dismissed at the dispositional hearing without an adjudication of delinquency if it is found that there is no need for supervision, treatment or confinement. *Matter of Ronny*, 40 Misc. 2d 194, 197, 242 N.Y.S. 2d 844 (1963); Family Court Act, §§ 731, 743, 751. Nor does an adjudication of delinquency necessarily lead to a commitment. It may result in a suspended judgment, probation or a placement other than a commitment (Family Court Act, § 753).

Upon an adjudication of delinquency a child may be committed only to the care and custody of an institution "suitable for the commitment of a delinquent child" maintained by the state or one of its subdivisions, to a commissioner of public welfare or to an authorized agency except, in some situations, when he is 15 years of age at the time of the commission of the wrongful act [*id.*, § 758(a)]. The exception is not applicable to the case at bar since the child involved was only about 12½ years old at the time. The exception for those 15 or older applies only where the act committed by them would have, if committed by an adult, been a class A or class B felony under the New York Penal Law. Even where this exception applies the commitment for boys may, but need not, be to a single specified reformatory, and for girls there is a similar limitation to a suitable institution [*id.*, § 758(b)]. The reformatory to which such boys may be committed is the Elmira Reception Center, which is otherwise limited to males between the ages of 16 and 21 (N.Y. Correction Law, §§ 60, 61).

No commitment may exceed three years [Family Court Act, § 758(c)].[5] The Rules of the Family Court provide that such a commitment shall be for an indefinite term which shall not exceed three years (Rule 7.7). It may be of some interest to note that, of all the boys adjudged delinquents in 1967-68, 73% had judgment suspended, were discharged with a warning, or were placed on probation; only 14% were specifically committed to a state training school, which may have been increased by some of the 8% who were discharged to another petition, as in the present case (*N.Y. Judicial Conference-14th Annual Report,* p. 267). The statistics with regard to girls show an even lesser percentage of commitment (*ibid*).

The statute provides for motions to modify any order or to terminate commitment (Family Court Act, §§ 762, 764-768). As is obvious from the present case, stenographic minutes of hearings are taken and the right to appeal is provided (*id.*, § 1011). Various sections provide that no adjudication shall be denominated a conviction and no juvenile delinquent shall be denominated a criminal; that no adjudication shall deprive a person of any right or privilege or disqualify him from holding office or receiving any license; and strictly limit the use of court or police records (*id.*, §§ 781-784).

The New York law, unlike that in most other jurisdictions, does not provide for any waiver to a criminal court.

The New York law was mentioned a number of times in the *Gault* opinion, almost always with an indication that its features were desirable (387 U.S. at pp. 11, 12, 24, 37, 40, 41, 46, 48, 52, 55, 57). This is also true of the *Task Force Report* (pp. 11, 15, 21, 23, 26, 28, 29, 33-38, 40).

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[5] Although it is not clear from the statute, apparently the period of commitment can be extended for a year at a time until a boy is 18 years old.

(3)

The appellant asserts that the privilege against self-incrimination is "severely diluted where the standard of proof is so low that a finding of guilt is virtually assured, should the juvenile elect to remain silent after only a *prima facie* case has been adduced" (Br., p. 23). This would appear to be mere conjecture. We are aware of no factual study that supports this hypothesis. It is likely that this would occur in a jury trial. It is, at most, a mere possibility in a trial before an experienced Family Court judge. And the statistics of the Family Court furnish a fairly strong indication that it does not occur in New York.

New York did not wait for the *Gault* decision before giving a child involved in a juvenile delinquency proceeding the right to remain silent. This right has been available since 1962 [Family Court Act, § 741(a)], and, since juveniles are usually represented by counsel, it must have been exercised often. In the 1967-68 year, 14,302 juvenile delinquency petitions were reported disposed of (*Judicial Conference-14th Annual Report,* p. 261). Almost half of these cases were terminated without an adjudication of delinquency for a variety of reasons and, significantly, 74% of these were so terminated because of a failure of proof (*id.,* p. 267). The disposition of well over one-third of the juvenile delinquency proceedings which reach the hearing stage by a finding of failure of proof do not square with appellant's conjecture that a finding of guilt is virtually assured once a *prima facie* case has been adduced where the juvenile remains silent. In view of the intake screening procedure, which in New York City alone disposed of 8,845 juvenile cases without formal referral to the court, it seems unlikely that it was impossible to make out a *prima facie* case in a great many of the hearings. The failure of proof must have been a failure to convince the Court, whether or not the juvenile testified.

(4)

The appellant and amicus point out that the secrecy of juvenile proceedings is not complete and that a finding of juvenile delinquency stigmatizes the child. Amicus details the extent of disclosure in the District of Columbia (Br., pp. 36-39), but neither of their briefs provide much to show the extent that this also occurs in New York. The efforts to maintain secrecy are substantial.

The governing statute authorizes the exclusion of the general public and the admission of only those who have a direct interest in the case (Family Court Act, § 741). As a matter of practice this is generally done, and those who are permitted to observe such hearings are usually required to agree not to reveal the name of the child involved.

Records of the Family Court may not be inspected except by permission of the court (*id.*, § 166). Police records relating to the arrest and disposition of any person involved in a juvenile delinquency proceeding are kept in separate files and are withheld from public inspection; they may be inspected upon good cause shown by a parent, guardian, next friend or attorney of the person upon the written order of a Family Court judge or, if the person is convicted of a crime, by a judge of the court in which he is convicted (*id.*, § 784).

Other efforts to maintain secrecy include the general practice of counsel to limit the title of a case on appeal and references in the briefs to the first name and the initial of the surname.[6] Although the full name is used in

[6] In the present case this was done in the New York courts (see, e.g., Appendix, pp. 36, 37, 38). Apparently, in the course of taking the appeal to this Court counsel for the appellant inadvertently failed to make sure that the anonymity continued. It is respectfully suggested that this practice be followed in any opinion of this Court.

the record, normally this is not available to the public because a printed record on appeal is not required (*id.*, § 1016) and the practice has been to use the Court's original record. In addition, the fact that a person was before the Family Court for a juvenile delinquency proceeding hearing and any confession, admission or statement made by him to the Court or any officer thereof in any stage of the proceeding is inadmissible as evidence against him or his interest in any other court; except that, in imposing sentence on an adult after conviction, another court may receive and consider such records (*id.*, § 783).

The secrecy which veils such a delinquency proceeding, even though it may not be entirely complete, differs completely from what occurs with respect to criminal cases. The contrast is most vivid when a newsworthy crime is solved and the captured perpetrators include adults and juveniles. The newspapers describe the juvenile by age and sex; the adults are named, their addresses given, often their pictures are printed and frequently many details of their lives are revealed. When the adult is tried, this is repeated in many instances. When the juvenile has his hearings, there is rarely, if ever, a mention of it in the press. Almost as great is the difference between the disabilities of and the prejudice against the adult criminal, the "ex-con," and the juvenile delinquent.

(5)

The appellant states, at page 23 of his brief, that a delinquency finding may preclude subsequent civil service employment, citing *Strong* v. *Kennedy*, 29 Misc 2d 54, 210 N.Y.S. 2d 588 (Sup.Ct., N.Y.Co., 1961). But the statement is directly contrary to the holding in that case. The Court, in ruling that a juvenile delinquency adjudication could not be the basis for denying a person a civil service position, referred to Family Court Act, Section 782.

(6)

The brief of amicus, at page 13, states that most courts are noting the necessity for according the same safeguards to juveniles and adults. It then asserts that: "Until the instant case, the authority in New York was to this effect." And, in a footnote to the quoted sentence, it cites and quotes from several New York cases which stated that proof beyond a reasonable doubt must be established.

In *People* v. *Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932), cert. den., 289 U.S. 709 (1933), the New York Court of Appeals said (p. 178):

> "The finding of fact must rest on the preponderance of the evidence adduced under those rules."

The opinion distinguished and explained *People* v. *Fitzgerald*, 244 N. Y. 307, 155 N.E. 584 (1927), which was decided under a different statute. See, also, GOLDSMITH, *Legal Evidence in the New York Children's Court*, 3 Brooklyn Law Review 24 (1933) at pp. 30 *et seq.*

Matter of Madik, 233 App. Div. 12, 251 N.Y.Supp. 765 (1931), preceded the *Lewis* case and was in effect overruled by it. *People* v. *Anonymous*, 53 Misc 2d 690, 279 N.Y.S. 2d 540 (1967), was not a juvenile delinquency proceeding. It was a proceeding under the "Youthful Offender" law (N.Y. Code of Criminal Procedure, §§ 913e-913r). That law applies to certain minors betwen the ages of 16 and 19 (id., § 913e), and it is governed, in large part, by the New York Penal Law (id., §§ 913-m, 913-q).

In re James Rich, 86 N.Y.S. 2d 308 (1949, *not officially reported*), contains a statement by a Children's Court judge which is inconsistent with the opinion of the New York Court of Appeals in the *Lewis* case, quoted above.

All of these cases, aside from the "youthful offender" case, were decided prior to the enactment of the Family Court Act in 1962, which specifically provides for the preponderance of evidence standard [§ 744(b)].

The fact that the reasonable doubt rule is related to what appellant calls the "integrity of the fact-finding process" (App. Br., p. 14), establishes neither its constitutional status nor its applicability to delinquency cases. Rules of relevancy, materiality, competency and hearsay are all intended to assure a reliable verdict. Yet they are not ordinarily thought of as giving rise to constitutional questions. See e.g., *Stein* v. *New York*, 346 U.S. 156, 196 (1953); *Mobile, J. & K.C. R.R.* v. *Turnispeed*, 219 U.S. 35, 43 (1910).

(7)

Amicus points out that a juvenile may be committed for a longer time than an adult who commits the same act (Br., p. 19). This is true in some instances. On the other hand, the commitment of a juvenile is often far shorter than that of adults. The most striking example, of course, is an act which, if committed by an adult, would constitute murder. A provision in the New York law which permitted a criminal court to try a person over 15 years of age for murder (Family Court Act, § 715) has been repealed (N.Y. Laws 1967, ch. 680, § 87).

Amicus also quotes at length from an opinion of a Rhode Island juvenile court judge (Amicus Br., pp. 29-30). The attitude of this judge is best illustrated by the following excerpts from his opinion:

> "* * * Let's face it, murder is murder; robbery is robbery; they are both criminal offenses, not civil, regardless and independent of the age of the doer. * * *

> * * * Let us not deal with a criminal matter in a civil way, with the result that we have a 'hodge podge' of nothingness."

An answer to such an attitude is well stated in the following quotation:

> "Another aspect of current thinking is a movement toward absolutism the world over * * * the movement * * * may easily be carried so far with mistaken zeal that * * * the juvenile courts in reaction may be pushed back into or may fall back into ordinary criminal courts of the old type * * *." [POUND, *The Juvenile Court and the Law*, in 10 Crime & Delinquency 490, 503 (1964)].

(8)

Although our argument assumes that proof beyond a reasonable doubt is a due process requirement in a criminal trial, it is not entirely clear that this is so. The reasonable doubt formula, it appears, was not used until the end of the 18th century and was applied at first only in capital cases. 9 WIGMORE, *Evidence* (3rd Ed., 1940), § 2497; MCCORMICK, *Evidence* (1954), § 321. Unquestionably it is applied in criminal proceedings in all the states; it is a "settled standard of the criminal law." *Holland* v. *United States*, 348 U.S. 121, 138 (1954).

It is true that Justice Frankfurter, in a dissenting opinion in *Leland* v. *Oregon*, 343 U.S. 790, 802-803 (1952), stated that due process required that guilt be established by this standard, but we have found no square decision or even clear dictum by this Court to that effect. At most we find statements, such as that in *Speiser* v. *Randall*, 357 U.S. 513 (1958), which say that (p. 526):

> "Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."

There are cases in which this Court has reversed a criminal conviction on due process grounds because there was no evidence of guilt to support it. *Thompson* v. *Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961). Yet there does not appear to be any case of a reversal by this Court on the ground that the evidence was insufficient to show guilt beyond a reasonable doubt.

Cases involving real questions of constitutional import are treated in a markedly different fashion. For example, when confronted with a claim that a book is or is not obscene or that a confession is or is not coerced, this Court does not limit its function to a determination that there is some evidence or even that there is adequate or sufficient evidence to support the finding that the confession was voluntary or that the book was obscene. On the contrary, the Court denies that it is at all bound by the jury's conclusions. It regards itself as obligated to make its own independent evaluation of the record in determining whether these particular constitutional rights have been violated. *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-190 (1964); *Haynes* v. *Washington*, 373 U.S. 503, 515-516 (1963). And this holds even if the jury has been meticulously instructed on the law of confessions or the law of obscenity.

The reason for this approach is evident. Whether or not the will has been overborne so as to culminate in a confession is a factual question. But, because a man has a constitutional right not to be coerced, the Court will reach its own determination, notwithstanding the judgment of the jurors. The degree of pruriency expressed in a book would also seem to be a question capable of final resolution by

the fact finders. The demands of free expression, however, require the Court to rely on its own judgment.

No similar independent evaluation of the record is made to determine whether guilt has been proved beyond a reasonable doubt. As the Court has held, the 14th Amendment does not provide for review of mere error in jury verdicts. *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944). On the other hand, the Court holds that such a review is required where it is claimed that constitutional rights have been impinged. Thus, if there truly were a constitutional right not to be convicted unless guilt has been proved beyond a reasonable doubt, there would seem no basis for providing a lesser mode of review than that used when other claims of due process violations are raised.

At page 13 of his brief the appellant appears to suggest that the presumption of innocence and the reasonable doubt standard are essentially equivalent. The difference between the two is clearly pointed out in *Coffin* v. *United States*, 156 U.S. 432, 460-461 (1895); and, although the statement therein that the presumption is the equivalent of evidence has been deprecated, this does not reflect on the validity of the distinction drawn by the Court. 9 WIGMORE, *Evidence* (3rd Ed., 1940), § 2511.

d. The effect of a declaration of unconstitutionality based on the ground that a juvenile delinquency proceeding is equivalent to a criminal trial.

(1)

A change in standard of proof in juvenile delinquency proceedings from the preponderance of evidence to proof beyond a reasonable doubt might well turn out to make little difference in the results of such proceedings. Theoretically there may be a substantial difference between the two measures of proof. And in a jury case the difference

is likely to be meaningful. It is far from clear, however, that this is so in a juvenile proceeding tried by an experienced and conscientious judge. It seems improbable that such a judge would reach a conclusion that a child is guilty of a wrongful act, with the potential of commitment as a result, unless he is fully convinced of his guilt. Several juvenile judges, to our limited knowledge, have stated that they never make such a finding in the absence of proof which is equivalent to that required in a criminal case.

Thus, the chances are that a prospective change in the quantum of proof required will not have a serious impact on the juvenile court in New York. A change which would apply retrospectively, however, would be extremely disruptive. A court which, despite increases in the number of its judges, has difficulty in keeping up with its calendars will be faced with the problem of retrying innumerable cases as well as dealing with the current calendar.

(2)

A declaration of unconstitutionality on the ground that the juvenile proceeding is equivalent to an adult criminal trial is, in addition, likely to have an even more serious impact. Such a determination may be regarded by this Court as almost automatically calling for other steps.

In light of *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), it might be concluded that jury trials are required since a juvenile faces the potentiality of confinement for more than two years. This, in our opinion, would completely alter the nature of the juvenile court in New York. See *Task Force Report*, p. 38. Instead of a juvenile court which conforms to the aims of its innovators, albeit somewhat modified and at times falteringly, it would become a more benevolent criminal court. A jury trial is usually more combative

than a trial before a judge. The judge presiding with a jury would have far less opportunity to give the child a feeling that he is the object of the state's care and solicitude. An attempt to do so might mislead the jury into thinking that he was expressing his view concerning the factual question before the jury. Secrecy would, to a large extent, disappear. Obviously, a pledge of secrecy by twelve members of a jury cannot be enforced.

A decision that the quantum of proof and the procedures in a juvenile delinquency proceeding must conform to that in an adult criminal trial might affect other aspects of the jurisdiction of the New York Family Court. In addition to juvenile delinquency proceedings the court handles matters involving "persons in need of supervision." Such persons are any male under sixteen years of age and female under eighteen "who is a habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parents or other lawful authority" (Family Court Act, § 712). The court, on its own motion, may substitute such a proceeding for a petition to determine delinquency (*id.*, § 716). Often the supervision proceeding is used even though the petition alleges an act which, if done by an adult, would constitute a crime (*Judicial Conference—14th Annual Report*, pp. 255-256). Under this proceeding there cannot be an order of commitment but the children can be placed in the custody of an "authorized agency" or a "Youth Opportunity Center" for an initial period of 18 months, subject to successive extensions for additional periods of one year each (Family Court Act, § 756).

It could, therefore, be argued with some force that such a proceeding is sufficiently analogous to a juvenile delinquency proceeding as to require the application of adult criminal standards also.

e. The possibility of confinement does not make use of the reasonable doubt standard a constitutional requirement.

We are aware of no decision by this Court which has held that the reasonable doubt standard of proof is constitutionally required in a proceeding which may lead to confinement. Even dicta to that effect appears to have been expressed, with possibly a rare exception, only in criminal cases.

Should it be held that proof beyond a reasonable doubt is a constitutionally compelled standard in juvenile proceedings on the basis of a conclusion that such a standard is required in any instance of governmentally compelled loss of liberty or confinement, the impact would be even more widespread.

Since children may be confined as a result of "persons in need of supervision" proceedings, presumably the criminal standard of proof would become applicable. It might even be applied to neglect proceedings under which children who are seriously neglected or abused by their parents may be taken from them and placed with relatives, a "duly authorized" agency or in an institution. (Family Court Act, §§ 311-374, 611-634). This apparently would be true in a number of other situations where presently the proof beyond a reasonable doubt standard is not generally applied. Some examples follow:

1. Confinement because of insanity. See 29 Am. Jur., *Insane Persons*, § 146.

2. Confinement for chronic alcoholism. E.g., N.Y. Mental Hygiene Law, § 307.

3. Confinement of sexual psychopaths. See Note, 24 A.L.R. 2d 350.

4. Confinement of narcotic addicts. See *People* v. *Fuller*, 24 N Y 2d 292, 304, 248 N.E. 2d 17, 22 (1969); *People* v. *Moore*, 69 Cal. 2d 674, 72 Cal. Rptr. 800, 446 P. 2d 800, 807 (1968). Cf. *Robinson* v. *California*, 370 U.S. 660 (1962).

5. Civil contempt commitment. See Note, 49 A.L.R. 975, 978.

POINT II

The application of a standard of proof in juvenile delinquency proceedings which differs from that applied in adult or youthful offender criminal cases does not constitute a denial of equal protection of the laws.

The appellant argues that it is a denial of the equal protection of the laws to apply the preponderance of evidence standard to juvenile delinquency proceedings while affording the proof beyond a reasonable doubt standard in adult and "youthful offender" criminal trials.

The argument, however, disregards the basic rule that there is no denial of equal protection where the applicability of different provisions of law rest upon a reasonable classification. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Ohio* v. *Akron Park District*, 281 U.S. 74, 81 (1930); *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584 (1935); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-489 (1955). It is sufficient that a reasonable basis for the distinction, even though not enunciated, can be conceived as a basis for the legislative action. *Rast* v. *Van Deman & Lewis*, 240 U.S. 342, 357 (1916); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

This rule is applied to legislation which relates to criminal proceedings as well as to civil matters. *McGowan* v. *Maryland*, 366 U.S. 420, 425-426 (1961); *Salsburg* v. *Mary-*

land, 346 U.S. 545 (1954); *Graham* v. *West Virginia*, 224 U.S. 616, 630 (1912); *Watson* v. *Maryland*, 218 U.S. 173, 178 (1910); *Missouri* v. *Lewis*, 101 U.S. 22, 31-32 (1879).

Here there is a more than ample reasonable basis for the distinction drawn. The statute provides that the adjudication in the juvenile delinquency proceeding may not be denominated a conviction and that the juvenile delinquent may not be denominated a criminal by reason of the adjudication. It also provides that no adjudication shall operate as a forfeiture of any right or privilege or disqualify any person from subsequently holding public office or receiving any license granted by public authority. It provides for the secrecy of the proceedings and strictly limits the use of records of the proceedings in other courts and the use of police records.

The intake procedures, which often dispose of a matter despite a wrongful act, differ sharply from criminal proceedings. Provision is made for unusually speedy action throughout the proceeding. There is also a great difference between the dispositional procedure in the juvenile proceeding and the sentencing procedure in criminal cases. Notwithstanding the commission of criminal acts, no juvenile may be adjudicated a delinquent until it is demonstrated at a dispositional hearing by a preponderance of the evidence that he requires supervision, confinement and treatment. Absent such proof, the petition must be dismissed. A similar result is impossible in the criminal law. Even where the adult receives a suspended sentence, the indictment and conviction stand and he remains branded a criminal.

Hence, it can be said that the juvenile enjoys a substantial benefit denied to the adult offender since the fact-finding hearing does not stand in the same relation to an ultimate adjudication and confinement as does the criminal trial.

New York, therefore, meets the test posed by this Court in *Kent* v. *United States,* 383 U.S. 541, 551-552 (1966), as to whether there is "any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae* evidencing * * * special solicitude for juveniles * * *."

In sum, what we have in New York, is a frank recognition that when dealing with children no intervention of any sort on the part of the State is justified unless a need for such intervention is demonstrated by adequate proof. If the proof fails, the State's interest ceases. PAULSEN, *The New York Family Court Act*, 12 Buff. L. Rev. 420, 437 (1963). No adult criminal is so protected. In short, the protection afforded the juvenile in New York in the resolution of the question of whether he should be deprived of his freedom is not equal to that given the adult; it is in many ways greater.

(2)

The appellant cites *Baxstrom* v. *Herold,* 383 U.S. 107 (1966) (App. Br., pp. 25, 28). There a jury trial was provided for all persons who were being committed because of insanity except for persons being so committed at the expiration of a penal sentence. This Court, in rejecting a contention that the classification was justified by the proven criminal tendencies of the allegedly insane prisoners, pointed out that the capriciousness of the classification was clearly revealed by the fact that the exception for prisoners was not applicable to persons with a past criminal record who were not in prison at the time of the institution of civil commitment proceedings (383 U.S. at pp. 114-115). The obvious absence of a rational basis for the classification has no parallel in the instant case.

The reliance by the appellant on the "youthful offender" procedure (N.Y.Code of Criminal Procedure, §§ 913-e to 913-r) seems equally unsound. It provides that the district attorney or a grand jury may recommend youthful offender treatment for youths between the ages of 16 and 19 who have committed a crime not punishable by death or life imprisonment and who have not previously been convicted of a felony (id., § 913-e, 913-g). The statute provides for a summary criminal trial without a jury, but an appellate court has held that a jury trial may be had as of right. *People* v. *Michael A.C. (Anonymous)*, 32 AD 2d 554, 300 N.Y.S.2d 816 (1969). There are some resemblances to the juvenile delinquency procedure in respect to secrecy and the effect of the adjudication, but in most other respects the Code of Criminal Procedure and the Penal Law govern. Surely the attempt to provide a procedure for some youths between the ages of 16 and 19 which is half way between that for juveniles and that for adult criminals should not make the differing procedures for juveniles a denial of equal protection.

The appellant also suggests that juveniles could be assisted without proof beyond a reasonable doubt under the "person in need of supervision" procedure (App. Br., p. 30). That procedure also provides for commitment. If appellant were successful in the present case and that procedure were then used for juveniles, the same attack would be made on it. And it would be difficult in defending such a case to distinguish it from the present one.

CONCLUSION

The appeal to this Court from the New York Court of Appeals should be affirmed.

January 2, 1970.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

In the Matter of SAMUEL WINSHIP,

Appellant.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Statement of Interest of the Attorney General of the State of New York

This case involves the constitutionality of § 744(b) of the Family Court Act, which provides that any determination in a Family Court fact-finding hearing that a juvenile committed certain acts, must be based upon a preponderance of the evidence. This rule is in harmony with the civil nature of Family Court proceedings, which seek to rehabilitate children rather than to punish offenders.

As the chief legal officer of the State (New York Executive Law, § 63), the Attorney General is charged with the defense of enactments of our State Legislature (Executive Law, § 71). The Attorney General's concern is the preservation of the civil character of hearings and dispositions in the Family Court.

Questions Presented

1. Does the requirement in the New York Family Court Act that any determination at the conclusion of a fact-finding hearing that a juvenile committed an act or acts must be based on a preponderance of the evidence, raise an issue under the due process clause of the Fourteenth Amendment or deny to juveniles due process of law?

2. Does separate treatment for children under 16 in the New York Family Court create an invidious distinction in violation of the equal protection clause of the Fourteenth Amendment, where all due process rights of such juveniles are preserved?

Statement of the Case

Appellant was charged with juvenile delinquency for an alleged act of larceny, in a petition filed in New York Family Court on March 30, 1967. The fact-finding hearing on this charge was conducted on March 30, 1967 before the Hon. Millard Midonick. Appellant was represented by an attorney from the Legal Aid Society.

The Evidence:

The petitioner in the Family Court proceeding was Rae Goldman, a saleslady at a furniture store in the Bronx, New York (4).* On March 28, 1967, at 6:15 in the evening petitioner was informed by a co-worker that the door to a small bathroom adjoining the locker room was locked (5). They waited to see who would emerge from the bathroom, and after a few moments appellant came out and ran from the store (5). Mrs. Goldman

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* References are to page numbers in appellant's Appendix.

rushed to see if her handbag, which had been left in the locker room at 5:30, was still there (5, 8). The handbag had disappeared, and was later found on the bathroom floor with the contents scattered and $112.00 of petitioner's money missing (5, 6). There were no customers in the store at the time, as it was the dinner hour; only two other employees were present (7).

Petitioner called the police, and described the boy to Patrolman Clarke as wearing a coat with a fur collar, glasses and a leather cap (10, 18, 19, 21). She had seen the boy not only when he ran out of the store (it was still daylight at the time), but had also seen him on at least 6 prior occasions "sneaking around and prowling around the store" (6, 7). He always carried a little shoe box with him and had once shined her shoes in the store (7).

Patrolman Clarke then testified that at about 8:30 P.M. on March 29, 1967 (the night following the theft of Rae Goldman's handbag), he found appellant trespassing in a bakery at East Fordham Road, less than 4 blocks from the store where Mrs. Goldman works (21-23). At the time he was apprehended, appellant had a shoe shine kit and two rolls of dimes totalling $10.00 (23). Appellant's counsel stated in connection with these dimes:

> "The boy said that he did not enter the premises of the bakery shop with the intent to commit a crime therein. He often went into the store to give shoe shines to the owner. When he went in, he saw the money lying on an open safe. He took the dimes to give to the clerk of the store and to tell the clerk that the money was not safe there." (30)

The Court Probation Officer informed the Court that at that time appellant, a twelve-year-old boy, was a parolee from a training school, his parole having been extended for 1 year as of 2/28/67. He had been sent to the training school for setting a fire and for burglary (30, 31).

Appellant's mother testified that her son left the house at about 3 or 4 o'clock on March 28, 1967 to go bicycle riding with his sister. He returned a little after 5:00 and they had dinner at 6:00 (11). In the evening he watched television with his father and did not leave the house (21).

Melvin Coleman, appellant's uncle, stated that he and appellant had eaten dinner together with appellant's mother every night on the week in question (16). However, after Patrolman Clarke testified that he had caught appellant on Wednesday evening in the bakery, the witness was recalled and testified that he had eaten with the family only on Monday and Tuesday (26).

Appellant testified that he had gone bicycle riding with his sister on March 28, 1967, after which he had returned home for dinner and stayed there to watch television (18).

Appellant denied ever having seen Mrs. Goldman before she appeared in the police station, denied ever having been inside the furniture store and denied ever having shined Mrs. Goldman's shoes (18). He did not explain how Mrs. Goldman had known that he wore a leather cap, a coat with a fur collar and glasses (18).

Decision of the Family Court:

At the conclusion of the hearing the Court ruled that "the testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well" (27). The Judge stated that he was "convinced of the facts alleged" (28).

POINT I

Section 744 of the New York Family Court Act does not contravene the due process clause of the Fourteenth Amendment.

The crux of appellant's argument appears to be that since a possible outcome of a Family Court adjudication is detention for rehabilitative treatment, the standard of proof used in juvenile delinquency proceedings must be that of "reasonable doubt" and that, therefore, Section 744(b) of the Family Court Act is unconstitutional (Br., p. 12). At the same time, appellant himself points out (Br., pp. 29-30) that Section 713 of the Family Court Act grants jurisdiction over "persons in need of supervision", where a child is shown to be ungovernable or beyond the lawful control of his parents. Detention of such persons, where rehabilitation is needed, is authorized under Sections 754 and 756 of the Family Court Act. There is, of course, no need under the latter sections for a finding under the reasonable doubt standard. Yet appellant refers to this procedure with approval, recognizing that a child "might be engaging in a general course of conduct inimical to his welfare which calls for judicial intervention . . ." (Br., pp. 29-30). Appellant also refers to other instances where detention or serious disabilities are governed by a civil standard of proof—commitment to mental institutions or civil narcotic facilities (Br., p. 25).

Thus, appellant's own brief underlines the fact that there is neither a necessary nor a logical relationship between standard of proof and the possibility of subsequent detention. Indeed, several courts have pointed out that to impose the reasonable doubt standard in juvenile courts would be contradictory to the duty of such courts to intervene while the troubled child is still at a receptive age.

This analysis is well set out in *Matter of Arenas*, 453 P. 2d 915 (Sup. Ct. of Oregon, 1969). Oregon law, like

New York law, empowers the Juvenile Court to act both in cases where the child commits an offense which would constitute a violation of law if committed by an adult, and in cases where a child is beyond parental control or endangering himself and others. The court ruled:

> "If the Constitution is held to prohibit the Juvenile Court from depriving a juvenile of his freedom unless it is proved beyond a reasonable doubt that he committed a criminal act, the constitution would have to be interpreted to prohibit depriving a juvenile of his freedom when he was found to have engaged in conduct not amounting to a crime.
>
> The logical end of such reasoning would be the conclusion that regardless of how apparent the need for intervention for the good of the child, the community, the judiciary and every other institution or agency would be powerless to act until and unless criminal conduct could be proved beyond a reasonable doubt. We are of the opinion that such a result is not a requirement which logically extends from *Gault* [387 U. S. 1]. The direct holding and firm implication of *Gault* is that in order for the Court to acquire jurisdiction some proscribed conduct must be proved and the procedures for proving such conduct must include notice, right of counsel, right to confrontation and cross-examination and the privilege of self incrimination."

See in accord *In re Dennis, M.*, 75 Cal. Rep. 1, 450 P. 2d 296 (Sup. Ct. of Calif., 1969); *In re Ellis*, 253 A. 2d 789 (D. C. Ct. of App., 1969).

This court's decision in *Matter of Gault*, 387 U. S. 1, 10-11 (1967), explicitly avoided passing upon the issue of quantum of proof. At the same time it made clear that juvenile proceedings must accord fundamental fairness to young offenders. This fundamental fairness has been scrupulously preserved in the New York Family Court

Right to counsel and notice is guaranteed. (See §§ 241-249, 736, 737, 741.) Evidence must be competent and relevant (§§ 744, 745).

The post-adjudicatory process is predicated upon the child's needs and his capacity to change. Placement of a child in a training school does not involve a minimum term of retention. Thus, it resembles the civil commitment of a mentally ill person, and is totally unlike the imprisonment of an adult.

The civil nature of these training schools is characterized by an open setting without the restraints of locks or bars.* The cottage unit system which is generally used is made up of semi-independent groups, many of which are limited to 20 young people. House parents live on the premises and act as guides and mentors, as well as supervisors. Home visits are made by the boys and girls on a regular basis, and vocational and academic features are provided. (See Schools and Centers for Children with Problems, New York State Department of Social Services.)

No collateral disabilities follow an adjudication of juvenile delinquency. Sec. 782, Family Court Act. For impeachment purposes, a finding of delinquency is not a "prior conviction". Sec. 783, Family Court Act; *Murphy* v. *City of New York*, 273 App. Div. 492 (1st Dept. 1948). Nor may such adjudication be a bar to a position in civil service or to the receipt of a license. Sec. 782, Family Court Act; *Cuccio* v. *Civil Service Comm.*, 40 Misc. 2d 345 (Sup. Ct., N. Y. Cty. 1963).** A youth may tell a pros-

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*One annex at Goshen, New York is an exception and provides some security precautions for juveniles who have demonstrated that they would harm themselves or others seriously unless they are restrained.

**The earlier case of *Strong* v. *Kennedy*, 29 Misc. 2d 54 (Sup. Ct. N. Y. Co. 1961), cited by appellant at p. 23 does not support appellant's point. Indeed, the Court pointed out that Section 84 of the former Domestic Relations Court Act forbids that a delinquent's adjudication operate as a forfeiture of any right to public office and points out that such a forfeiture would be against public policy.

pective employer that he has never been adjudicated a delinquent. 67 Col. L. Rev. 281, 291, n. 57 (1968). The right to vote is also specifically preserved. See, New York Election Law, Sections 152, 154; *Green* v. *Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966).

The emphasis upon the need for treatment rather than a criminal act is also underscored by the fact that no child can be detained or even kept under supervisory jurisdiction if it is determined at the dispositional hearing (which succeeds the fact-finding hearing) that he is not in need of care or treatment. It is interesting to note that appellant commends as appropriate (Br., p. 28) the preponderance of the evidence standard at this stage, again recognizing the importance of judicial intervention where necessary.

Thus the Family Court Act, in both the sections relating to juvenile delinquency and the inter-related sections dealing with "persons in need of supervision", demonstrates that its primary concern is serving the needs of the child. The possibility of detention therefore cannot be a basis for mandating the criminal law standard of reasonable doubt in such proceedings.

In other contexts, the New York courts have not regarded the phrase "preponderance of the evidence" as excluding a construction requiring "clear and convicing evidence".* For example, in discussing State coram nobis hearings, Judge Botein held in *People* v. *Chait*, 7 App. Div. 399 (1st Dept., 1959), aff'd. 6 N. Y. 2d 855 (1959):

> "Once a hearing is granted • • • the petitioner has the burden of proving deprivation of his consti-

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* The standard of "clear and convincing evidence" was adopted by the Supreme Court of Arizona in *Application of Gault*, 99 Ariz. 181, 407 P. 2d 760, and left undisturbed by this Court in reviewing the decision. See also *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (Sup. Ct. of Ohio, 1969); *State* v. *Santana*, 444 S. W. 2d 614 (Sup. Ct. of Texas, 1969).

> tutional rights * * * His contentions must be established clearly and convincingly, by a preponderance of the credible evidence * * *"

See also, *United States ex rel. Brennan* v. *Fay,* 353 F. 2d 56 (2d Cir., 1965), reviewing the *Chait* case; *People* v. *Weiss,* 19 App. Div. 2d 900, 244 N.Y.S. 2d 914 (2d Dept., 1963).

The "clear and convincing" measure of proof was also created by judicial construction as to filiation cases under Article 5 of the Family Court Act. See e. g. *Commissioner of Public Welfare* v. *Ryan,* 238 App. Div. 607 (1st Dept., 1933); *Commissioner of Welfare* v. *Wendtland,* 25 App. Div. 2d 640 (1st Dept., 1966); *Martin* v. *Lane,* 57 Misc. 2d 4 (Fam. Ct., Dutchess Cty., 1968); *Matter of Gray* v. *Rose,* 30 App. Div. 2d 138 (3rd Dept. 1968).

B. It is not surprising that this Court has never declared that the measure of persuasion is an element of due process under the Fourteenth Amendment. This is consistent with the refusal to review the quantity (as opposed to the quality or admissibility) of evidence on direct appeal or collateral attack on a judgment. *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *United States ex rel. Morton* v. *Mancusi,* 393 F. 2d 482 (2d Cir. 1968).

Indeed, terminology relating to quantity of evidence and measure of proof has frequently been criticized as unhelpful and unrealistic. As pointed out in *Wigmore on Evidence,* Third Edition (1940), Vol. IX, Section 2497, p. 325:

> "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief . . . if this truth be appreciated, Courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose . . ."

The English rule is referred to in *Rex* v. *Summers*, 1 All. E. R. 1059, 1060 (C. Cr. A. 1952):

> "I have never yet heard any court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used."

This appears to be the reason why *Wigmore on Evidence*, Third Edition, *supra*, Section 2498, p. 327 opposes the extension of the reasonable doubt standard to cases where it has heretofore not applied:

> ". . . [T]he chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case.
>
> • • • • • •
>
> It is sometimes said that in general, *wherever* in a civil case a *criminal act is charged* as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated." (Emphasis in original.)

From a realistic standpoint, there seems to be little basis for declaring any particular measure of persuasion to be an indispensable element of due process and to disturb and alter the historical development of the standards in juvenile courts, where decisions are made by experienced judges rather than by juries. The factor which is significant is that the state continues to bear the burden of proof, and that evidence to be adduced be competent and reliable.

The instant case illustrates this point. Appellant's commission of the act charged was clearly and convincingly proven. The saleslady whose handbag was stolen had left the bag in a locker room adjoining a small bath-

room. Appellant was seen running out of the bathroom, in which he had locked himself, where moments later the handbag was found with its contents scattered and the money missing. At the time, there were no customers in the store.

Not only did the saleslady recognize the boy, who had been in the store on at least six prior occasions and had shined her shoes, but she also described to the police the coat with the fur collar, leather cap and glasses which appellant wears. Appellant's uncle who testified for him as a witness contradicted himself and offered completely unconvincing evidence. The Court pointed out that "the testimony and description of the petitioner [saleslady] was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well." While the judge stated that he was using preponderance of the evidence as a basis for his finding, he also made clear that he was "convinced of the facts alleged" (28).

POINT II

Section 744 does not violate the equal protection clause of the Fourteenth Amendment since the Family Court Act grants to juveniles under sixteen unique treatment appropriate to their age and capacity to be rehabilitated.

Appellant asserts that although this Court's decision in *Gault* was based upon a denial of due process, there was an implicit reliance upon the equal protection clause of the Fourteenth Amendment as well, in that this Court wished to accord to juvenile offenders certain critical safeguards which are guaranteed for adult criminals. However, as pointed out by appellant himself, there are numerous substantial differences in New York's procedure for adult and child offenders which afford special treatment to the latter group.

Appellant's brief (pps. 26-28) contains a catalogue of the unique aspects of the pre-judicial or "intake" phase (Family Court Act § 734). Regardless of whether or not the child has committed an act which would constitute a crime if committed by an adult, the case may be adjusted so that he never comes to court at all.

There are differences in the fact-finding hearing as well. Decisions are made by judges who are experts in the field, not by juries. And under § 762, the Court may on its own motion or on the motion of any interested person vacate any order issued in the course of a proceeding under Article 7. Sections 753-756 confer a broad range of further powers upon the Juvenile Court judge. Under § 716, he may change a petition alleging juvenile delinquency to one alleging that a child is a "person in need of supervision".

The mandatory secrecy in the proceedings which must be accorded to all children (contrast the discretionary Youthful Offender provision, § 913[g] of the N. Y. Code of Crim. Proc.) and the collateral consequences of a delinquency adjudication have already been described in Point I(A) *supra*.

Of equal significance is the dispositional hearing which succeeds the fact-finding hearing. If a child needs no care or treatment, the petition against him is dismissed at the dispositional stage. Appellant incorrectly states that "such a disposition is precisely like a suspended sentence in a criminal case" (Br., p. 28). Such a dismissal means that the child has not been found delinquent. Moreover, while a suspended sentence in a criminal case can be imposed under certain conditions, a dismissal at a dispositional hearing constitutes an unconditional discharge.

It is also important to remember that the child is correctly viewed by the public as in a different category from those over sixteen; his acts are taken less seriously in that

he is regarded as needing assistance rather than as a criminal.

As can be seen, differences in the treatment of children in the Family Court vis-a-vis adults in the Criminal Courts are advantageous to the child offender. Apparently appellant does not dispute this fact, but contends that the pre-adjudicatory and post-adjudicatory phases should not be considered in determining the measure of proof under § 744(b).

However, it is impossible to isolate the dispositional hearing and the purposes of the Family Court Act from the preponderance of the evidence standard. The equal protection clause which appellant invokes does not require identity of treatment. *Walters* v. *City of St. Louis*, 347 U. S. 231, 237 (1954). As this Court made clear in *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961):

> "The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective."

The objective of Article 7 of the Family Court Act is to allow necessary judicial intervention while the character of a child is still in the process of formation. With the adult offender there is, of course, always the hope that detention will have a rehabilitative effect. However, the criminal law is predicated upon the commission of certain acts and a prescribed punishment for those acts. By contrast, judicial supervision over a child is based upon a demonstrated need for psychological assistance.

That this purpose is a valid one has been attested by experts in the field. As the Court noted in *State* v. *Arenas*, *supra*, 453 P. 2d at 920:

> "The theory that some agency should have the power to intervene with juveniles when they have engaged in conduct indicating the need for such intervention has

substantial and respected backing from social and behavioral scientists." Task Force Report, Juvenile Delinquency and Youth Crime [The President's Commission on Law Enforcement and Administration of Justice] at pp. 22-28 [1967].

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Dated: New York, N. Y., January 8, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969.

No. 778

In the Matter of

SAMUEL WINSHIP,

Appellant.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

(1)

Appellee suggests that appellant did not face a six-year confinement because section 758(c) of the New York Family Court Act provides that a "commitment" may not exceed three years. [Appellee's Brief, p. 1, n. 1.] Appellee has seemingly confused the difference between a "placement" and a "commitment" of a delinquent under the New York statute. [See also, Appellee's Brief, p. 22, n. 5.] They are two separate and distinct dispositions. FAM. CT. ACT, §753(b); §753(d). While a commitment is limited to three years [FAM. CT. ACT, §758(c)], section 756 of the statute provides with regard to placements that:

> (b) Placements under this section may be for an initial period of eighteen months and the court in its discre-

tion may, at the expiration of such period, make successive extensions for additional periods of one year each. The place in which or the person with which the child has been placed under this section shall submit a report at the end of the year of placement, making recommendations and giving such supporting data as is appropriate. The court on its own motion may at the conclusion of any period of placement hold a hearing concerning the need for continuing placement.

(c) Successive extensions may be granted, but no placement may be made or continued under this section beyond the child's eighteenth birthday if male, or twentieth birthday if female, without his or her consent and in no event past his or her twenty-first birthday.

Appellant was in fact *placed* in the Training School rather than committed [Printed Appendix, p. 35] and hence faced incarceration until his eighteenth birthday, that is, for six years. In actual practice, the placement procedure rather than the commitment procedure is customarily employed by the New York Family Court precisely because it permits significantly longer confinement. Thus, a recent study by the Community Service Society of New York reports that ninety-five per cent of the juveniles in the New York Training Schools are there pursuant to a placement order rather than a commitment order. *Out of Sight—Out of Mind, A Report of the New York State Training Schools in the Downstate Complex*, 1967, p. 6.*

* While the court has the option either to place or to commit where confinement is to the State Training Schools, a commitment order is necessary where confinement is to be made at the Elmira Reformatory. Commitment to Elmira (which is under the auspices

(2)

In a strained effort to withhold this case from the logic and language of *Gault*, appellee contends that *Gault* made only one "statement, as far as we can find, that treats a juvenile delinquency proceeding as though it were criminal in nature" and that the single statement was confined to the juvenile's privilege against self-incrimination. [Appellee's Brief, p. 11.] While appellant has not argued that juvenile and adult proceedings need be indistinguishable, appellee's reading of *Gault* distorts the clear language and import of that opinion. To cite but two, among many, expressions of this Court's realistic assessment of the work of the juvenile court and the penal consequences of an adjudication, we quote the following:

> "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional hours. . . .' [citations

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of the New York Department of Correction rather than the Department of Social Service) is authorized only where the juvenile committed a class A or B felony as defined by the New York Penal Law when he was over the age of fifteen. FAM. CT. ACT, §758(b).

omitted] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness [citation omitted] to rape and homicide." *In Re Gault*, 387 U.S. at 27.

"The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case." *Id.* at 29.

(3)

Appellee contends that overruling the New York statute with regard to the standard of proof would "almost automatically" require such further criminal-court-type innovations as jury trials in juvenile proceedings. [Appellee's Brief, p. 31.] Moreover, he misleadingly frames the questions in this case to be whether *any* involuntary confinement requires *all* the protections available to an adult criminal defendant and whether, in any event, *all* such protections must apply to delinquency proceedings. [Appellee's Brief, p. 2.] The question actually presented is patently the much narrower one of whether the highest standard of proof, and that alone, must be accorded to juveniles facing incarceration for delinquency.

It may be that jury trials or other procedures will be required in juvenile proceedings. But if so, it will not be because of a decision in the instant case. To hold that elemental fairness requires proof to the highest degree of certainty is not, as appellee suggests, to hold that a juvenile proceeding must resemble a criminal trial in every respect, or indeed, in any other respect.

In the same vein, appellee concedes the failure of the juvenile court in New York to meet its commendable goals [Appellee's Brief, pp. 16-17] but argues that despite its failures, the juvenile court should not merge with the criminal courts. He urges that the juvenile court remain susceptible to further unspecified future reforms. Appellant quite agrees that the court should be left open to improvement. Appellant contends only that notwithstanding the uncertain prospect of substantial reform in the New York juvenile court and facilities, the Constitution requires that the risk of error be reduced in determining which children must be subjected to the judicial process, by requiring that their guilt be proved beyond a reasonable doubt.

(4)

Appellee unnecessarily argues that proof beyond a reasonable doubt is not required in every proceeding which may lead to confinement. [Appellee's Brief, pp. 33-34.] Thus he cites several types of adjudications for hospitalization or other commitment of the insane, alcoholics, sexual psychopaths, narcotic addicts and the like. It is readily apparent that the commitment of such individuals is predicated upon an altogether different basis than the confinement of a juvenile delinquent. In the types of cases cited by appellee, the adjudication is predicated essentially upon medical evidence relating to a mental or physical condition. An appropriate standard of proof preceding confinement of a juvenile for a law violation can easily be evaluated in its own context, without reference to other adjudications leading to confinement.

(5)

Appellee insists that the two-stage procedure for juvenile cases in New York justifies a lower standard of proof at the fact-finding hearing. [Appellee's Brief, p. 35.] He argues that because the need for confinement must be factually adduced at the dispositional hearing, less certainty is required at the hearing at which guilt or innocence is established. The two-stage proceeding, however, has direct parallels in the criminal law in such matters, for example, as the sentencing of multiple offenders or of dangerous sexual offenders. In such cases, additional facts warranting the imposition of special sentences must, as in delinquency proceedings, be adduced at a separate sentencing hearing. The requirement of the second hearing, however, does not reduce the government's burden of proving guilt of the underlying law violation beyond a reasonable doubt. See *Specht* v. *Patterson*, 386 U.S. 605 (1967); *People* v. *Bailey*, 21 N.Y.2d 588 (1968).

CONCLUSION

WHEREFORE, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 778.—October Term, 1969

In the Matter of Samuel Winship, Appellant. | On Appeal From the Court of Appeals of New York.

[March 31, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

Constitutional questions decided by this Court concerning the juvenile process have centered on the adjudicatory stage at "which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." *In re Gault*, 387 U. S. 1, 13 (1967). *Gault* decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of "the essentials of due process and fair treatment." *Id.*, at 30. This case presents the single, narrow question whether proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.[1]

[1] Thus, we do not see how it can be said in dissent that this opinion "rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations." As in *Gault*, "we are not here concerned with . . . the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process." 387 U. S., at 13. In New York, the adjudicatory stage of a delinquency proceeding is clearly distinct from both the preliminary phase of the

Section 712 of the New York Family Court Act defines a juvenile delinquent as "a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." During a 1967 adjudicatory hearing, conducted pursuant to § 742 of the Act, a judge in New York Family Court found that appellant, then a 12-year-old boy, had entered a locker and stolen $112 from a woman's pocketbook. The petition which charged appellant with delinquency alleged that his act, "if done by an adult, would constitute the crime or crimes of Larceny." The judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, but rejected appellant's contention that such proof was required by the Fourteenth Amendment. The judge relied instead on § 744 (b) of the New York Family Court Act which provides that "[a]ny determination at the conclusion of [an adjudicatory] hearing that a [juvenile] did an act or acts must be based on a preponderance of the evidence."[2] During a subsequent dispositional hearing, appellant was ordered placed in a training school for an initial period of 18

juvenile process and from its dispositional stage. See N. Y. Family Court Act §§ 731–749. Similarly, we intimate no view concerning the constitutionality of the New York procedures governing children "in need of supervision." See *id.*, at §§ 711–712, 742–745. Nor do we consider whether there are other "elements of due process and fair treatment" required during the adjudicatory hearing of a delinquency proceeding. Finally, we have no occasion to consider appellant's argument that § 744 (b) is a violation of the Equal Protection Clause, as well as a denial of due process.

[2] The ruling appears in the following portion of the hearing transcript:

Counsel: "Your Honor is making a finding by the preponderance of the evidence."

Court: "Well, it convinces me."

Counsel: "It's not beyond a reasonable doubt, Your Honor."

Court: "That is true . . . . Our statute says a preponderance and a preponderance it is."

months, subject to annual extensions of his commitment until his 18th birthday—six years in appellant's case. The Appellate Division of the New York Supreme Court, First Judicial District, affirmed without opinion, 291 N. Y. S. 2d 1005 (1968). The New York Court of Appeals then affirmed by a four-to-three vote, expressly sustaining the constitutionality of § 744 (b), 24 N. Y. 2d 196, 247 N. E. 2d 253 (1969).[3] We noted probable jurisdiction, 396 U. S. 885 (1969). We reverse.

I

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was

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[3] Accord, *e. g., In re Dennis M.*, 75 Cal. Rptr. 1, 450 P. 2d 296 (1969); *Matter of Ellis*, 253 A. 2d 789 (D. C. 1969); *State* v. *Arenas*, 453 P. 2d 915 (Ore. 1969); *State* v. *Santana*, 444 S. W. 2d 614 (Texas 1969). *Contra, United States* v. *Costanzo*, 395 F. 2d 441 (C. A. 4th Cir. 1968); *In re Urbasek*, 38 Ill. 2d 535, 232 N. E. 2d 716 (1967); *Jones* v. *Commonwealth*, 185 Va. 335, 38 S. E. 2d 444 (1946); N. D. Gen. Stat., c. 27-20, § 29 (2) (1969); Colo. Rev. Stat., c. 22, Art. 3, § 6 (1) (1967); Md. Code Ann., Art. 26, § 70-18 (a) (1969); N. J. Ct. Rules 6:9 (1) f (1967); Wash. Sup. Ct., Juv. Ct. Rules, § 4.4 (b) (1969); cf. *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969).

Legislative adoption of the reasonable-doubt standard has been urged by the National Conference of Commissioners on Uniform State Laws and by the Children's Bureau of the Department of Health, Education, and Welfare's Social and Rehabilitative Service. See Uniform Juvenile Court Act § 29 (b) (1968); Children's Bureau, Social & Rehabilitative Service, U. S. Department of Health, Education, & Welfare, Legislative Guides for Drafting Family and Juvenile Court Acts § 32 (c) (1969). Cf the proposal of the National Council on Crime and Delinquency that a "clear and convincing" standard be adopted. Model Rules for Juvenile Courts, Rule 26, at 57 (1969). See generally Cohen, The Standard of Proof in Juvenile Proceedings: *Gault* Beyond a Reasonable Doubt, 68 Mich. L. Rev. 567 (1970).

recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." McCormick, Evidence, § 321, at 681–682 (1954); see also 9 Wigmore, Evidence, § 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968).

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. See, for example, *Miles* v. *United States*, 103 U. S. 304, 312 (1880); *Davis* v. *United States*, 160 U. S. 469, 488 (1895); *Holt* v. *United States*, 218 U. S. 245, 253 (1910); *Wilson* v. *United States*, 232 U. S. 563, 569–570 (1914); *Brinegar* v. *United States*, 338 U. S. 160, 174 (1949); *Leland* v. *Oregon*, 343 U. S. 790, 795 (1952); *Holland* v. *United States*, 348 U. S. 121, 138 (1954); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). Cf. *Coffin* v. *United States*, 156 U. S. 432 (1895). Mr. Justice Frankfurter stated that "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland* v. *Oregon*, *supra*, at 802–803 (dissenting opinion). In a similar vein, the Court said in *Brinegar* v. *United States*, *supra*, at

174, that "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Davis* v. *United States, supra,* at 488, stated that the requirement is implicit in "constitutions . . . [which] recognize the fundamental principles that are deemed essential for the protection of life and liberty." In *Davis* a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: "On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime. . . . No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Id.*, at 484, 493.

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States, supra,* at 453. As the dissenters in the New York Court of

Appeals observed, and we agree, "a person accused of crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 24 N. Y. 2d, at 205, 247 N. E. 2d, at 259.

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser* v. *Randall, supra,* at 525–526: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." Dorsen & Rezneck, *In re Gault* and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, at 26 (1967).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of

the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

II

We turn to the question whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. The same considerations which demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child. We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of § 744 (b). The Court of Appeals indicated that a delinquency adjudication "is not a 'conviction' (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confidentiality is thrown around all the proceedings (§§ 783–784)." 24 N. Y. 2d, at 200, 247 N. E. 2d, at 255–256. The court said further: "The delinquency status is not made a crime; and the proceedings are not criminal. There is, hence, no deprivation of due process in the statutory pro-

vision [challenged by appellant] . . . ." 24 N. Y. 2d, at 203, 247 N. E. 2d, at 257. In effect the Court of Appeals distinguished the proceedings in question here from a criminal prosecution by use of what *Gault* called the " 'civil' label of convience which has been attached to juvenile proceedings." 387 U. S., at 50. But *Gault* expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding. 387 U. S., at 50–51. The Court of Appeals also attempted to justify the preponderance standard on the related ground that juvenile proceedings are designed "not to punish, but to save the child." 24 N. Y. 2d, at 197, 247 N. E. 2d, at 254. Again, however, *Gault* expressly rejected this justification. 387 U. S., at 27. We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *Id.*, at 36.

Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process.[4] Use of the reasonable-

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[4] Appellee, New York City, apparently concedes as much in its Brief, page 8, where it states:

"A determination that the New York law unconstitutionally denies due process because it does not provide for use of the reasonable doubt standard probably would not have a serious impact if all that resulted would be a change in the quantum of proof."

And Dorsen & Reznek, *supra*, at 27, have observed:

"[T]he reasonable doubt test is superior to all others in protecting against an unjust adjudication of guilt, and that is as much a concern of the juvenile court as it is of the criminal court. It is difficult to see how the distinctive objectives of the juvenile court give rise

doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing.

The Court of Appeals observed that "a child's best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court." 24 N. Y. 2d, at 199, 247 N. E. 2d, at 255. It is true, of course, that the juvenile may be engaging in a general course of conduct inimical to his welfare which calls for judicial intervention. But that intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law [5] and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.

We conclude, as we concluded regarding the essential due process safeguards applied in *Gault*, that the observance of the standard of proof beyond a reasonable doubt

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to a legitimate institutional interest in finding a juvenile to have committed a violation of the criminal law on less evidence than if he were an adult."

[5] The more comprehensive and effective the procedures used to prevent public disclosure of the finding, the less the danger of stigma. As we indicated in *Gault*, however, often the "claim of secrecy . . . is more rhetoric than reality." 387 U. S., at 24.

"will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Gault, supra,* at 21.

Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a "tenuous difference" between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt which he conceded he might not have made under the standard of proof beyond a reasonable doubt. Indeed, the trial judge's action evidences the accuracy of the observation of commentators that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." Dorsen & Reznek, *supra,* at 26–27.[6]

III

In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and

[6] Compare this Court's rejection of the preponderance standard in deportation proceedings, where we ruled that the Government must support its allegations with "clear, unequivocal and convincing evidence." *Woodby* v. *Immigration & Naturalization Service,* 385 U. S. 276, 285 (1966). Although we ruled in *Woodby* that deportation is not tantamount to a criminal conviction, we found that since it could lead to "drastic deprivations," it is impermissible for a person to be "banished from this country upon no higher degree of proof than applies in a negligence case." *Ibid.*

examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." 24 N. Y. 2d, at 207, 247 N. E. 2d, at 260.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 778.—October Term, 1969

In the Matter of Samuel Winship, Appellant. | On Appeal From the Court of Appeals of New York.

[March 31, 1970]

Mr. Justice Harlan, concurring.

No one, I daresay, would contend that state juvenile court trials are subject to *no* federal constitutional limitations. Differences have existed, however, among the members of this Court as to *what* constitutional protections do apply. See *In re Gault*. 387 U. S. 1 (1967).

The present case draws in question the validity of a New York statute which permits a determination of juvenile delinquency, founded on a charge of criminal conduct, to be made on a standard of proof which is less rigorous than that which would obtain had the accused been tried for the same conduct in an ordinary criminal case. While I am in full agreement that this statutory provision offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment, I am constrained to add something to what my Brother Brennan has written for the Court, lest the true nature of the constitutional problem presented become obscured or the impact on state juvenile court systems of what the Court holds today be exaggerated.

I

Professor Wigmore, in discussing the various attempts by courts to define how convinced one must be to be convinced beyond a reasonable doubt, wryly observed: "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method

of communicating intelligently . . . a sound method of self-analysis for one's beliefs," 9 Wigmore, Evidence 325 (1940).[1]

Notwithstanding Professor Wigmore's skepticism, we have before us a case where the choice of the standard of proof has made a difference: the juvenile judge below forthrightly acknowledged that he believed by a preponderance of the evidence, but was not convinced beyond a reasonable doubt, that appellant stole $112 from the complainant's pocketbook. Moreover, even though the labels used for alternative standards of proof are vague and not a very sure guide to decisionmaking, the choice of the standard for a particular variety of adjudication does, I think, reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations.[2]

To explain why I think this so, I begin by stating two propositions, neither of which I believe can be fairly disputed. First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof

[1] See also Paulsen, Juvenile Courts and the Legacy of '67, 43 Ind. L. J. 527, 551–552 (1968).

[2] For an interesting analysis of standards of proof see Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065, 1071–1077 (1968).

beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for

there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly,[3] it simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." [4]

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As MR. JUSTICE BRENNAN wrote for the Court in *Speiser* v. *Randall*, 357 U. S. 513, 525–526:

> "There is always in litigation a margin of error, representing error in fact-finding which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."

In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. It is only because of the nearly complete and long-standing acceptance of the reasonable-

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[3] The preponderance test has been criticized, justifiably in my view, when it is read as asking the trier of fact to weigh in some objective sense the quantity of evidence submitted by each side rather than asking him to decide what he believes most probably happened. See Maguire, Evidence, Common Sense and Common Law 180 (1947).

[4] F. James, Civil Procedure, 250–251 (1965); see Morgan, Some Problems of Proof 84–85 (1956).

doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness,[5] requires a more stringent standard for criminal trials than for ordinary civil litigation.

[5] In dissent my Brother BLACK again argues that, apart from the specific prohibitions of the first eight amendments, any procedure spelled out by a legislature—no matter how unfair—passes constitutional muster under the Due Process Clause. He bottoms his conclusion on history that he claims demonstrates that (1) due process means "law of the land"; (2) any legislative enactment, *ipso facto*, is part of the law of the land; and (3) the Fourteenth Amendment incorporates the prohibitions of the Bill of Rights and applies them to the States. I cannot refrain from expressing my continued bafflement at my Brother BLACK's insistence that Due Process, whether under the Fourteenth Amendment or the Fifth Amendment, does not embody a concept of fundamental fairness as part of our scheme of constitutionally ordered liberty. His thesis flies in the face of a course of judicial history reflected in an unbroken line of opinions which have interpreted due process to impose restraints on the procedures government may adopt in its dealing with its citizens, see, *e. g.*, the cases cited in my dissenting opinions in *Poe* v. *Ullman*, 367 U. S. 497, 522, 539–545 (1961); *Duncan* v. *Louisiana*, 391 U. S. 145, 171 (1968); as well as the uncontroverted scholarly research (notwithstanding Flack, The Adoption of the Fourteenth Amendment (1908)), respecting the intendment of the Due Process Clause of the Fourteenth Amendment, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). Indeed, with all respect, the very case cited in Brother BLACK's dissent as establishing that "due process of law" means "law of the land" rejected the argument that any statute, by the mere process of enactment, met the requirements of the Due Process Clause. In *Murray's Lessee* v. *Hoboken Land & Improv. Co.*, 18 How. 272 (1855), an issue was whether a "distress warrant" issued by the Solicitor of the Treasury under an Act of Congress to collect money due for taxes offended the Due Process Clause. Justice Curtis wrote: "That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. But is it 'due process of law?' The Constitution contains no description of those processes which it was intended to allow or forbid. It does

II

When one assesses the consequences of an erroneous factual determination in a juvenile delinquency proceeding in which a youth is accused of a crime, I think it must be concluded that, while the consequences are not identical to those in a criminal case, the differences will not support a distinction in the standard of proof. First, and of paramount importance, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends. And, second, a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime.[6] Although there are no doubt costs

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not even declare what principles are to be applied to ascertain whether it be due process. *It is manifest that it was not left to the legislature power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.*" *Id.*, at 276. (Emphasis supplied.)

[6] The New York statute was amended to distinguish between a "juvenile delinquent"—*i. e.*, a youth "who does any act which, if done by an adult, would constitute a crime," N. Y. Family Ct. Act § 712 (1963), and a "[p]erson in need of supervision" [PINS] who is a person "who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control or other lawful authority." The PINS category was established in order to avoid the stigma of finding someone to be a "juvenile delinquent" unless he committed a criminal act. The Legislative Committee report stated: "'Juvenile delinquent' is now a term of disapproval. The judges of the Children's Court and the Domestic Relations Court of course are aware of this and also aware that government officials and private employers often learn of an adjudication of delinquency." N. Y. Jt. Legislative Committee on Court Reorganization, The Family Court Act, Pt. 2, at 7 (1962). Moreover, the powers of the police and courts differ in these two cate-

to society (and possibly even to the youth himself) in letting a guilty youth go free, I think here, as in a criminal case, it is far worse to declare an innocent youth a delinquent. I therefore agree that a juvenile court judge should be no less convinced of the factual conclusion that the accused committed the criminal act with which he is charged than would be required in a criminal trial.

III

I wish to emphasize, as I did in my separate opinion in *Gault*, 387 U. S. 1, 65, that there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases.[7] It is of great importance, in my view, that procedural strictures not be constitutionally imposed that jeopardize "the essential elements of the State's purpose" in creating juvenile courts, *id.*, at 72. In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found to be a delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a "criminal" because he has been found to be a delinquent, or (3) burden the juvenile courts

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gories of cases. See *id.*, at 7–9. Thus, in a PINS type case, the consequences of an erroneous factual determination are by no means identical to those involved here.

[7] In *Gault*, for example, I agree with the majority that due process required (1) adequate notice of the "nature and terms" of the proceedings; (2) notice of the right to retain counsel, and an obligation on the State to provide counsel for indigents "in cases in which the child may be confined"; and (3) a written record "adequate to permit effective review." 387 U. S., at 72. Unlike the majority, however, I thought it unnecessary at the time of *Gault* to impose the additional requirements of the privilege against self-incrimination, confrontation, and cross-examination.

with a procedural requirement which will make juvenile adjudications significantly more time consuming, or rigid. Today's decision simply requires a juvenile judge to be more confident in his belief that the youth did the act with which he has been charged.

With these observations, I join the Court's opinion, subject only to the constitutional reservations expressed in my opinion in *Gault*.

SUPREME COURT OF THE UNITED STATES

No. 778.—October Term, 1969

In the Matter of Samuel Winship, Appellant. | On Appeal From the Court of Appeals of New York.

[March 31, 1970]

Mr. Chief Justice Burger, with whom Mr. Justice Stewart joins, dissenting.

The Court's opinion today rests entirely on the assumption that all juvenile proceedings are "criminal prosecutions," hence subject to constitutional limitations. This derives from earlier holdings, which like today's holding, were steps eroding the differences between juvenile courts and traditional criminal courts. The original concept of the juvenile court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders. Since I see no constitutional requirement of due process sufficient to overcome the legislative judgment of the States in this area, I dissent from further strait-jacketing of an already overly-restricted system. What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.

Much of the judicial attitude manifested by the Court's opinion today and earlier holdings in this field is really a protest against inadequate juvenile court staffs and facilities; we "burn down the stable to get rid of the mice." The lack of support and the distressing growth of juvenile crime have combined to make for a literal breakdown in many if not most juvenile courts.

Constitutional problems were not seen while those courts functioned in an atmosphere where juvenile judges were not crushed with an avalanche of cases.

My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.

SUPREME COURT OF THE UNITED STATES

No. 778.—October Term, 1969

In the Matter of Samuel Winship, Appellant. } On Appeal From the Court of Appeals of New York.

[March 31, 1970]

Mr. Justice Black, dissenting.

The majority states that "many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Ante*, at 4. I have joined in some of those opinions, as well as the dissenting opinion of Mr. Justice Frankfurter in *Leland* v. *Oregon*, 343 U. S. 790, 802 (1952). The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution. The Bill of Rights, which in my view is made fully applicable to the States by the Fourteenth Amendment, see *Adamson* v. *California*, 332 U. S. 46, 71–75 (1947) (dissenting opinion), does by express language provide for, among other things, a right to counsel in criminal trials, a right to indictment, and the right of a defendant to be informed of the nature of the charges against him.[1] And in two places the Constitution provides for trial by jury,[2] but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt. The Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas

[1] Amends. V, VI, U. S. Constitution.

[2] Art. III, § 2, cl. 3; Amend. VI, U. S. Constitution.

of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. That this old "shock the conscience" test is what the Court is relying on, rather than the words of the Constitution is clearly enough revealed by the reference of the majority to "fair treatment" and to the statement by the dissenting judges in the New York Court of Appeals that failure to require proof beyond a reasonable doubt amounts to a "lack of fundamental fairness." *Ante*, at 1, 6. As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.

I

Our Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law."[3] The four words—due process of law—have been the center of substantial legal debate over the years. See *Chambers* v. *Florida*, 309 U. S. 227, 235–236 & n. 8 (1939). Some might think that the words themselves are vague. But any possible ambiguity disappears when the phrase is viewed in the light of history and the accepted meaning of those words prior to and at the time our Constitution was written.

"Due process of law" was originally used as a shorthand expression for governmental proceedings according to the "law of the land" as it existed at the time of those proceedings. Both phrases are derived from the laws of England and have traditionally been regarded as

[3] The Fifth Amendment applies this limitation to the Federal Government and the Fourteenth Amendment imposes the same restriction on the States.

meaning the same thing. The Magna Charta provided that:

> "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or otherwise destroyed; nor will we not pass upon him, nor condemn him but by lawful judgment of his peers, or by law of the land."[4]

Later English statutes reinforced and confirmed these basic freedoms. In 1350 a statute declared that "it is contained in the great charter of the franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the law of the land . . . ."[5] Four years later another statute provided "that no man of what estate or condition that he is, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law."[6] And in 1363 it was provided "that no man be taken or imprisoned, nor put out of his freehold, without process of law."[7]

Drawing on these and other sources, Lord Coke, in 1642, concluded that "due process of law" was synonymous with the phrase "by law of the land."[8] One of the earliest cases in this Court to involve the interpretation of the Due Process Clause of the Fifth Amendment declared that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta.*"

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[4] 9 Hen. 3, c. 1, cap. 29 (1225). The same provision appeared in cap. 39 of the original issue signed by King John in 1215.

[5] 24 Ed. 3, cap. IV.

[6] 28 Ed. 3, cap. III.

[7] 37 Ed. 3, cap. XVIII.

[8] Coke's Institutes, Second Part, 50 (1st ed. 1642).

Murray's Lessee v. *Hoboken Land & Improv. Co.*, 18 How. 272, 276 (1855).

While it is thus unmistakably clear that "due process of law" means according to "the law of the land," this Court has not consistently defined what "the law of the land" means and in my view members of this Court frequently continue to misconceive the correct interpretation of that phrase. In *Murray's Lessee, supra,* Mr. Justice Curtis, speaking for the Court, stated:

> "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process is in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on them after the settlement of this country." *Id.*, at 276–277.[9]

[9] Compare *United States* v. *Hudson & Goodwin*, 7 Cranch 32 (1812), in which the Court held that there was no jurisdiction in federal courts to try criminal charges based on the common law and that all federal crimes must be based on a statute of Congress.

Later in *Twining* v. *New Jersey*, 211 U. S. 78 (1908), Mr. Justice Moody, again speaking for the Court, reaffirmed that "due process of law" meant "by law of the land," but he went on to modify Mr. Justice Curtis' definition of the phrase. He stated:

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and not shown to have been unsuited to their civil and political condition by having been enacted on them after the settlement of this country. . . .
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> "Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the Amerisan jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. . . .
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> "Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Id.*, at 100–101.[10]

In those words is found the kernel of the "natural law due process" notion by which this Court frees itself from the limits of a written Constitution and sets itself loose

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[10] Compare the views of Mr. Justice Iredell in *Calder* v. *Bull*, 3 Dall. 386, 398 (1798).

to declare any law unconstitutional that "shocks its conscience," deprives a person of "fundamental fairness," or violates the principles "implicit in the concept of ordered liberty." See *Rochin* v. *California*, 342 U. S. 165, 172 (1952); *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). While this approach has been frequently used in deciding so-called "procedural" questions, it has evolved into a device as easily invoked to declare invalid "substantive" laws that sufficiently shock the consciences of five members of this Court. See, *e. g.*, *Lochner* v. *New York*, 198 U. S. 45 (1905); *Coppage* v. *Kansas*, 236 U. S. 1 (1915); *Burns Baking Co.* v. *Bryan*, 264 U. S. 504 (1924); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). I have set forth at length in prior opinions my own views that this concept is completely at odds with the basic principle that our Government is one of limited powers and that such an arrogation of unlimited authority by the judiciary cannot be supported by the language or the history of any provision of the Constitution. See, *e. g.*, *Adamson* v. *California*, 332 U. S. 46, 68 (1947) (dissenting opinion); *Griswold* v. *Connecticut*, 381 U. S. 479, 507 (1965) (dissenting opinion).

In my view both Mr. Justice Curtis and Mr. Justice Moody gave "due process of law" an unjustifiably broad interpretation. For me the only correct meaning of that phrase is that our Government must proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions as interpreted by court decisions. The Due Process Clause, in both the Fifth and Fourteenth Amendments, in and of itself does not add to those provisions, but states that our governments are governments of law and constitutionally bound to act only according to law.[11] To some that view may seem a degrading and niggardly view of what is undoubtedly a fundamental part of our basic freedoms.

[11] It is not the Due Process Clause of the Fourteenth Amendment, standing alone, that requires my conclusion that that Amendment was intended to apply fully the protection of the Bill of Rights to actions by the States. That conclusion follows from the language

But that criticism fails to note the historical importance of our Constitution and the virtual revolution in the history of the government of nations that was achieved by forming a government that from the beginning had its limits of power set forth in one written document which also made it abundantly clear that all governmental actions affecting life, liberty, and property were to be according to law.

For years our ancestors had struggled in an attempt to bring England under one written constitution, consolidating in one place all the threads of the fundamental law of that nation. They almost succeeded in that attempt,[12] but it was not until after the American Revolution that men were able to achieve that long-sought goal. But the struggle had not been simply to put all the constitutional law in one document, it was

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of the entire first section of the Fourteenth Amendment, as illuminated by the legislative history surrounding its adoption. See *Adamson* v. *California, supra,* 71–75, 92–123.

MR. JUSTICE HARLAN continues to insist that uncontroverted scholarly research shows that the Fourteenth Amendment did *not* incorporate the Bill of Rights as limitations on the States. See *Poe* v. *Ullman,* 367 U. S. 497, 540 (1961) (dissenting opinion); *Griswold* v. *Connecticut, supra,* at 500 (concurring in the judgment); *ante,* at pp. 5–6, n. 5. I cannot understand that conclusion. Mr. Fairman, in the article repeatedly cited by MR. JUSTICE HARLAN, surveys the legislative history and concludes that it is his opinion that the amendment did not incorporate the Bill of Rights. Mr. Flack, in at least an equally "scholarly" writing, surveys substantially the same documents relied upon by Mr. Fairman and concludes that a prime objective of Congress in proposing the adoption of the Fourteenth Amendment was "[t]o make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the States." Compare Flack, The Adoption of the Fourteenth Amendment (1908), with Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949). It is of course significant that since the publication of those works this Court has held the vast majority of the provisions of the Bill of Rights applicable to the States. See *Gideon* v. *Wainwright,* 372 U. S. 335 and cases cited therein at 341–342.

[12] See J. Frank, The Levellers (1955).

also to make certain that men would be governed by *law*, not the arbitrary fiat of the man or men in power. Our ancestors' ancestors had known the tyranny of the Kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Charta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase "due process of law." The many decisions of this Court which have found in that phrase a blanket authority to govern the country according to the views of five members of this institution have ignored the essential meaning of the very words they invoke. When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends the majority's own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the "law of the land" and instead becomes one governed ultimately by the "law of the judges."

It can be, and has been, argued that when this Court strikes down a legislative act because it offends the idea of "fundamental fairness," it furthers the basic thrust of our Bill of Rights by protecting individual freedom. But that argument ignores the effect of such decisions on perhaps the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society. Our Federal Government was set up as one of limited powers, but it was also given broad power to do all that was "necessary and proper" to carry out its basic purpose of governing the Nation, so long as those powers were not exercised contrary to the limitations set forth in the Constitution. And the States, to the extent they are not restrained by the provisions in that document, were to be left free to govern themselves in accordance with their own views of fairness and decency. Any legislature presumably

passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is equally as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people, in my opinion, should never be denied by this Court except when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution.

II

I admit a strong, persuasive argument can be made for a standard of proof beyond a reasonable doubt in criminal cases—and the majority has made that argument well—but it is not for me as a judge to say for that reason that Congress or the States are without constitutional power to establish another standard which the Constitution does not otherwise forbid. It is quite true that proof beyond a reasonable doubt has long been required in federal criminal trials. It is also true that this requirement is almost universally found in the governing laws of the States. And as long as a particular jurisdiction requires proof beyond a reasonable doubt, then the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard. See *Turner* v. *United States*, 396 U. S. 398, 430 (1970) (BLACK, J., dissenting). But when, as here, a State through its duly constituted legislative branch decides to apply a different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the "law of the land." The State of New York has made such a decision, and in my view nothing in the Due Process Clause invalidates it.